

THE ROMAN ASSEMBLIES



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TORONTO

THE ROMAN ASSEMBLIES

FROM THEIR ORIGIN TO THE END
OF THE REPUBLIC

BY

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Το

MY WIFE

Οὐ μὲν γὰρ τοῦ γε κρείσσον καὶ ἄρειον,
*Ἡ ὅθ' ὁμοφρονέοντε νοήμασιν οἶκον ἔχοντον
Ἀνὴρ ἠδὲ γυνή· πόλλ' ἄλγεα δυσμενέεσσι,
Χάρματα δ' εἰμενέτησι· μάλιστα δὲ τ' ἔκλυον αὐτοί.

PREFACE

THIS volume is the first to offer in monographic form a detailed treatment of the popular assemblies of ancient Rome. Necessarily much of the material in it may be found in earlier works; but recent progress in the field, involving a reaction against certain theories of Niebuhr and Mommsen affecting the comitia, justifies a systematic presentation of existing knowledge of the subject. This task has required patient labor extending through many years. The known sources and practically all the modern authorities have been utilized. A determination to keep free from conventional ideas, so as to look at the sources freshly and with open mind, has brought views of the assemblies not found in other books. The reader is earnestly requested not to reject an interpretation because it seems new but to examine carefully the grounds on which it is given. In general the aim has been to follow a conservative historical method as opposed to the radical juristic, to build up generalizations on facts rather than to estimate sources by the criterion of a preconceived theory. The primary object of the volume, however, is not to defend a point of view but to serve as a book of study and reference for those who are interested in the history, law, and constitution of ancient Rome and in comparative institutional research.

In the preparation of the volume, I have been generously aided by my colleagues in Columbia University. To Professor William M. Sloane, Head of the Department of History, I owe a great debt of gratitude for kindly sympathy and encouragement in the work. It is an especial good fortune that the proofs have been read by Professor James C. Egbert. Many improvements are due to his scholarship and editorial experience. Professor George N. Olcott has advised me on various numismatic matters, and I am indebted to Dr. John L. Gerig

for information on two or three etymologies. The proofs have also been read and corrections made by Dr. Richard R. Blews of Cornell University. It is a pleasure to remember gratefully these able friends who have helped me with their special knowledge, and to add the name of Mr. Frederic W. Erb of the Columbia University Library, whose courtesy has facilitated the borrowing of books for the study from other institutions.

Notwithstanding every effort to make the work accurate, mistakes and inconsistencies will doubtless be found in it, and I shall thankfully welcome suggestions from any reader for its further correction and improvement.

GEORGE WILLIS BOTSFORD.

MOUNT VERNON, NEW YORK,
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THE ROMAN ASSEMBLIES

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PART I

ELEMENTS OF THE COMITIAL CONSTITUTION

CHAPTER I

THE POPULUS AND ITS EARLIEST POLITICAL DIVISIONS

I. *The Populus*

THE derivation of *populus*, "people," "folk," is unknown. Attempts have been made to connect it with *populari*, "to devastate," so as to give it primarily a military signification — perhaps simply "the army."¹ In the opinion of others it is akin to *plēnus*, *plēbes*, *πλήθος*, *πολύς*, *πίμπλημι*,² in which case it would signify "multitude," "mass," with the idea of collective strength, which might readily pass into "army" as a secondary meaning.³ Fundamentally personal, it included all those individuals, not only the grown men but their families as well, who collectively made up the state, whether Roman or foreign, monarchical or republican.⁴ Only in a transferred sense did it apply to territory.⁵ The ancient definition, "an association based on the common acceptance of the same body of laws and

¹ Cf. Mommsen, *Röm. Forsch.* i. 168 and n. 1. Schrader, *Reallex.* 920 f., accepts this explanation as most probable, and connecting it with Skt. *cakrá-*, interprets it as referring to a wheel formation of the army. But Vaniček, *Griech.-lat. etym. Wörterb.* 1085 f., connects *populari* with *spol-iu-m*.

² Curtius, *Griech. Etym.* 260, English, 344; Corssen, *Ausspr.* i. 368, 422; Vaniček, *Etym. Wörterb. d. lat. Spr.* 90; *Griech.-lat. etym. Wörterb.* 506; Walde, *Lat. etym. Wörterb.* 480 f.; cf. Schrader, *ibid.*; Genz, *Patr. Rom.*, 51 f.

³ This interpretation would explain *magister populi* and *populari*. *Plebs*, on the other hand, denoted the multitude as distinguished from the leaders; hence it differed from *populus*, notwithstanding Herzog, *Röm. Staatsverf.* i. 98, n. 2.

⁴ Cf. Mommsen, *Röm. Staatsr.* iii. 3.

⁵ Livy xxi. 34. 1.

on the general participation in public benefits,"¹ is doubtless too abstract for the beginnings of Rome. Citizenship — membership in the *populus* — with all that it involved is elaborately defined by the Roman jurists;² but for the earlier period it will serve the purpose of the present study to mention that the three characteristic public functions of the citizen were military service, participation in worship, and attendance at the assembly.³ In a narrower sense *populus* signifies "the people," "masses," in contrast with the magistrates or with the senate, as in the well known phrase, *senatus populusque Romanus*.

II. *The Three Primitive Tribes*

The Romans believed that the three tribes which composed the primitive *populus* were created by one act in close relation with the founding of the city.⁴ For some unknown reason they were led to connect the myth of Titus Tatius, the eponymous hero of the Titians,⁵ with the Quirinal,⁶ and with the Sabines,⁷ who were generally supposed to have occupied that

¹ Cic. *Rep.* i. 25. 39; Livy i. 8. 1; Isid. *Etym.* ix. 6. 5.

² Cf. Madvig, *Röm. Staat.* i. 34 ff.; Schiller, *Röm. Alt.* 612 ff.

³ "Arma sumere, sacris adesse, concilium inire"; Tac. *Germ.* 6. 6; 13. 1. On the Indo-European relation of the army to the folk, see Schrader, *Reallex.* 349 f. For Rome, Mommsen, *Röm. Staatsr.* iii. 3 f.

⁴ Cic. *Rep.* ii. 8. 14; Dion. Hal. ii. 7. 2; Plut. *Rom.* 14, 20; Ovid, *Fast.* iii. 131; Dio Cass. *Frag.* 5. 8; Varro, *L. L.* v. 55; Colum. v. 1. 9.

⁵ As Romulus was the eponymous hero of the Ramnes (or of all the Romans?) and Lucerus (Fest. ep. 119) of the Luceres.

⁶ The original seat of the hero at Rome was on the Capitoline near the site of the later temple of Juno Moneta; Plut. *Rom.* 20. It was closely connected, therefore, with the auguraculum on the spot; Varro, *L. L.* v. 47; Cic. *Off.* iii. 16. 66; Fest. ep. 16. Perhaps his name has some etymological relation with titiare, "to chirp as a sparrow"; Varro, *L. L.* v. 85 (titii avibus); Pais, *Storia di Roma*, I. i. 277 and n. 3; Forcellini, *Lex.* s. v. The Sodales Titii, who attended to his worship (cf. Dion. Hal. ii. 52. 5; Tac. *Ann.* i. 54; *Hist.* ii. 95) were accustomed to take a certain kind of auspices from birds; Varro, *ibid.* His tomb was in a place called Lauretum on the Aventine (Pais, *ibid.* 279), confused probably with Laurentum, where he is said to have been killed. All these circumstances indicate that Titus Tatius was an indigenous Roman, or at most a Latin hero, and that his connection with the Sabines is an ill-founded, relatively late idea. The primary origin of the word Titians is Etruscan; Schulze, *Lat. Eigennam.* 218.

⁷ Possibly because the rites of the Titian sodales seemed to be Sabine (cf. Tac. *Ann.* i. 54); but even if they were, this circumstance would not make the Titian tribe Sabine.

hill.¹ Consequently some of their historians felt compelled to defer their account of the institution of the tribes till they had told of the union of the Sabines with the Romans, which at the same time gave them an opportunity to derive the names of the curiae from those of the Sabine women. Varro,² however, who protests against this derivation, refers the organization of the people in the three tribes to an earlier date, connecting it immediately with the founding of Rome. Though he affirmed that one tribe was named after Romulus, another after Titus Tatius, and the third, less positively, after an Etruscan Lucumo, Caeles Vibenna, who came to the aid of Romulus against Titus Tatius,³ neither he nor any other ancient writer identified the Tities with the Sabines, whose quarter in the city was really unknown,⁴ or the Luceres with an Etruscan settlement under Caeles whether in the Vicus Tuscus⁵ or on the Caelian hill.⁶ Since the Romans knew the tribe in no other relation than as a part of the state, they could not have thought of their city as consisting originally of a single tribe, to which a second and afterward a third were added, or that any one of these three tribes had ever been an independent community. These views are modern;⁷ there is no trace of them in the ancient writers.⁸

¹ Varro, however, placed them on the Aventine. A Sabine settlement on the Quirinal has not been proved; cf. Lécrivain, in Daremberg et Saglio, *Dict.* ii. 1514.

² In Dion. Hal. ii. 47. 4; cf. 7. 2; Plut. *Rom.* 13.

³ *L. L.* v. 46, 55; Serv. in *Aen.* v. 560.

⁴ P. 2, n. 6, and n. 1 above.

⁵ Serv. *ibid.*

⁶ Cf. Hülsen, in Pauly-Wissowa, *Real-Encycl.* iii. 1273.

⁷ Proposed by Niebuhr, *Röm. Gesch.* i. 311 ff., English, i. 153 ff. In his opinion the three tribes were of different nationalities. His view, with or without the theory of national syncretism, has been accepted by many scholars, including Schwegler, *Röm. Gesch.* i. 480 ff., 497-514; Lange, *Röm. Alt.* i. 82 ff.; Peter, *Gesch. Roms.* i. 60; Madvig, *Röm. Staat.* i. 97 f.; Herzog, *Röm. Staatsverf.* i. 23 f. (with some reserve); Schiller, *Röm. Alt.* 621; Ihering, *Geist des röm. Rechts.* i. 309, 313; Genz, *Patr. Rom.* 89 ff.; Bernhöft, *Röm. Königs.* 79; Puchta, *Curs. d. Inst.* i. 73; Soltau, *Röm. Volksversamml.* 46 f.; Kubitschek, *Röm. trib. or.* 4; Mommsen, *Röm. Staatsr.* iii. 96 f.; Willems, *Sén. Rom.* i. 7; Schrader, *Reallex.* 801; Nissen, *Templum.* 145 f.; *Ital. Landesk.* ii. 496.

⁸ Against the view that the three tribes were once independent communities are Volquardsen, in *Rhein. Mus.* xxxiii. 542 ff.; Meyer, *Gesch. d. Alt.* ii. 510; Lécrivain, in Daremberg et Saglio, *Dict.* ii. 1514 a; Holzapfel, in *Beitr. z. alt. Gesch.* i. 241, 249 ff.; Platner, *Top. and Mon. of Anc. Rome*, 33. Ihne, *Hist. of Rome*, i. 114, thinks they probably had reference only to the army. The double nature of many

Even if it could be proved that they took this point of view, the question at issue would not thereby be settled; for no genuine tradition regarding the origin of the primitive tribes came down to the earliest annalists; the only possible knowledge they possessed on this point was deduced from the names of the tribes and from surviving institutions presumably connected with them in the period of their existence.¹ Under these circumstances modern speculations as to their independent character and diverse nationality seem absurd. The proper method of solving the problem is to test and to supplement the scant sources by a comparative study of the institution.

The low political vitality of the three primitive Roman tribes, as of the corresponding Greek phylae,² when we first meet with them in history, points to the artificiality of these groups—a condition indicated further both by their number and by their occurrence in other Italian states.³ Far from being con-

Roman institutions—a phenomenon on which scholars chiefly rely for their theory of a once existent two-tribe state—may better be explained by the union of the Sabines with the Romans after the institution of the three tribes; as this relatively later date would at the same time explain the six-fold character of various institutions. That the union took place in the beginning of the fifth century B.C. is believed by Pais, *Storia di Roma*, I. i. 277. Or the stated increase in the number of members of the vestals, augurs, pontiffs, and more particularly of senators, may be due to an ancient theory, dimly hinted at in the sources, of an admission of the second and third tribes successively to representation in these bodies; cf. Niebuhr, *Röm. Gesch.* i. 320 f., English, i. 157; Bloch, *Orig. d. sén.* 32 ff.

¹ Bormann, in *Eran. Vind.* 345–58, following a hint offered by Niese, *Röm. Gesch.* (1st ed. 1886) 585, has gone so far as to deny their existence, setting them down as an invention of Varro; but Holzapfel, in *Beitr. z. alt. Gesch.* i. 230 ff., proves that Cicero and other sources did not draw from Varro their information regarding the tribes. Against Bormann, see also Pais, *ibid.* I. i. 279, n. 1.

² That the primitive Roman tribes were in character substantially identical with the primitive Greek phylae cannot be doubted. Apparently the four Ionic phylae in Attica offered no resistance to dissolution at the hands of Cleisthenes; cf. Hdt. v. 66; Arist. *Ath. Pol.* 21. (For the best treatment of the Greek phylae, see Szanto, E., *Ausgewählte Abhandlungen*, 216–88, who maintains that the institution was artificial.) In like manner the three Roman tribes disappeared, leaving but scant traces; p. 7.

³ Mantua, till late an Etruscan city, had three tribes; Serv. in *Aen.* x. 202. In this connection it is significant that Volnius, an Etruscan poet, declared the primitive tribal names to be Etruscan; Varro, *L. L.* v. 55. The information suggests the possibility that some Etruscan cities had these same tribes; cf. Fest. 285. 25; *CIL.* ix. 4204 (locality unknown). In fact these names can be ultimately traced to Etruscan gentilicia; Schulze, *Lat. Eigennam.* 218, 581. The triplet champions of

fined to Rome, the tripartite division of the community belonged to many Greek and to most Italian peoples,¹ and has entered largely into the organization of communities and nations the world over.² A derivation of *tribus*, Umbrian *trifu*, accepted by many scholars, connects it with the number three.³ The wide use of this conventional number, and more particularly the regular recurrence of the same three Dorian tribes in many Dorian cities—as of the same four Ionic tribes in many Ionic cities⁴—and of the same three Latin (or Etruscan?) tribes in several old Latin cities, could not result from chance combi-

Alba point to a division of this community into three tribes; Niebuhr, *Röm. Gesch.* i. 386; Schwegler, *Röm. Gesch.* i. 502. The story that T. Tatius was killed at Lavinium indicates the existence of a tomb of the hero in that place—a clear sign of a tribe of Tities there; Livy i. 14. 2; Dion. Hal. ii. 52; cf. Varro, *L. L.* v. 152. A trace of Ramnes is found at Ardea; Serv. in *Aen.* ix. 358. There were Ramnennii in Ostia (*CIL.* xiv. 1542) and Ramnii in Capua; *ibid.* x. 3772; Schulze, *Lat. Eigennam.* 218. The existence of a tribe of Luceres in Ardea is vouched for by Lucerus, its eponymous hero, king of that city; Fest. ep. 119; Pais, *Storia di Roma*, I. i. 279. The word in various forms occurs in certain Etruscan towns; Schulze, *ibid.* 182. These facts make it probable that some at least of the Latin as well as Etruscan cities had the same three tribes.

¹ The Etruscans had twelve cities in each of their three districts; Strabo v. 4. 3; Livy v. 33. Each city had three consecrated gates and three temples to Jupiter, Juno, and Minerva; Serv. in *Aen.* i. 422. The Umbrians had three hundred cities in the Po valley, destroyed by the Etruscans; Pliny, *N. H.* iii. 14. 113. The Brutians were organized in a confederation of twelve cities; Livy xxv. 1. 2. The Iapygians were divided into three branches (Polyb. iii. 88. 4), each of which comprised twelve smaller groups; Bloch, *Orig. d. sén.* 9 f.; Holzapfel, in *Beitr. z. alt. Gesch.* i. 245 ff., 252 f. The tripartite division also existed in many pagi which continued to historical time; Kornemann, in *Klio*, v. 83.

² These facts are too well known to need illustration; cf. Nissen, *Templum*, 144; Bloch, *Orig. d. sén.* 1 ff.

³ Varro, *L. L.* v. 55. *Tribus* = tri-bu-s: bu- is related to *φύ-* "to grow," Skt. *bhū-*; *tribus*, corresponding to *φύ-λῆς*, would then signify "three-branch;" Corsen, *Ausspr.* i. 163; Pott, *Etym. Forsch.* i. 111, 217; ii. 441; Vaniček, *Etym. Wörterb. d. lat. Spr.* 69; *Griech.-lat. etym. Wörterb.* 636; Bloch, *ibid.* 9. Schlossman, in *Archiv f. lat. Lexicog.* xiv (1905). 25-40, connecting *tribus* with *tres*, interprets it not as a third but as an indefinite part, cf. *entzweien* with the meaning to divide in several parts. Schrader, *Reallex.* 801, is doubtful as to the etymology; cf. Walde, *Lat. etym. Wörterb.* 636. The connection of the word with *tres* is denied by Madvig, *Röm. Staat.* i. 96; Nissen, *Ital. Landesk.* ii. 8, n. 5. Christ, in *Sitzb. d. bayer. Akad.* 1906. 204, prefers to connect it with Celt *trebo- (Old Irish *treb*), "house," Goth. *thairp*, "village." Oscan *trebo-* also means "house."

⁴ The existence of four Ionic tribes in all Ionic cities cannot be maintained; cf. Wilamowitz-Möllendorff, in *Sitzb. d. Berl. Akad.* 1906. 71.

nations in all these places, but point unmistakably to the systematic imitation of a common pattern. That pattern must be ultimately sought in the pre-urban *populus*, *ἔθνος*, folk. If we assume that before the rise of city-states the Ionian folk was organized in four tribes (*phylae*) and the Dorian and Latin folks in three tribes, we shall have a condition such as will satisfactorily explain the tribal organization of the city-states which grew up within the areas occupied by these three folks respectively. The thirty votes of the Latins may be best explained by assuming a division of their *populus* into three tribes, subdivided each into ten groups corresponding to the Roman *curiae*. Whereas in Umbria the decay of the pre-urban *populus* allowed its tribes to become independent,¹ in Latium a development in that direction was prevented by the rise of city-states, which completely overshadowed the preëxisting organization.

The Italian city-state grew not from a tribe or a combination of tribes, but from the *pagus*,² "canton," a district of the pre-urban *populus* with definite consecrated boundaries,³ usually centering in an *oppidum* — a place of defence and refuge.⁴ In the beginning the latter enjoyed no superior right over the territory in which it was situated.⁵ A *pagus* became a *populus* at the point of time when it asserted its political independence of the folk. The new state organized itself in tribes and *curiae* after the pattern of the folk. In the main this arrangement

¹ The *tribus Sapia* was the territory of the Sabinian community (Liv. xxxi. 2. 6; xxxiii. 37. 1), just as the *trifu Tarinate* was the territory of the community (*tuta, tota*, Osc. *touto*; *Tab. Bant.* 2) *Tadinum*; *Tab. Iguv.* vi. b. 54; cf. iii. 24; Buck, *Grammar of Oscan and Umbrian*, 278 f., 298; Bücheler, *Umbrica*, see index, s. *Tref*, *Trefiper*; Kornemann, in *Klio*, v. 87.

² Christ, in *Sitzb. d. bayer. Akad.* 1906. 207.

³ Livy i. 55. 3 f.; *CIL.* ix. 1618, 5565; Nissen, *Ital. Landesk.* ii. 8 ff.; Kornemann, in *Klio*, v. 80.

⁴ Dion. Hal. iv. 15; Nissen, *Ital. Landesk.* ii. 9–15. Doubtless *oppidum* applied primarily to the enclosing wall, thence to the space enclosed; Caes. *B. G.* v. 21; Varro, *L. L.* v. 153. From the beginning it must have been the chief or central settlement of the *pagus*, though the organization was not urban but territorial-tribal; cf. Pöhlmann, *Anfänge Roms*, 40 ff.

⁵ Livy ix. 41. 6; x. 18. 8; *CIL.* i. 199; Isid. *Etym.* xv. 2. 11: "Vici et castella et pagi sunt quae nulla dignitate civitatis ornantur, sed vulgari hominum conventu incoluntur et propter parvitatem sui maioribus civitatibus attribuuntur;" Fest. ep. 72; Nissen, *ibid.* 11.

was artificial, yet it must have taken some account of existing ties of blood.¹ At the same time the oppidum became an urbs² — a city, the seat of government of the new populus. Thus arose the city-state. In the case of Rome several oppida with parts of their respective pagi³ were merged in one urbs — that known as the city of the four regions.⁴ Urbs and ager excluded each other, just as the oppidani contrasted with the pagani;⁵ but both were included in the populus.

Most ancient writers represent the three tribes as primarily local,⁶ and the members as landowners from the founding of the city.⁷ Although their view may be a mere inference from the character of the so-called Servian tribes, the continuity of name from the earlier to the later institution points to some degree of similarity between them. It can be easily understood, too, how in time the personal feature might have so overcome the local as to make the old tribes appear to be based on birth in contrast with the territorial aspect of the new.⁸

It was probably on the institution of the later tribes that the earlier were dissolved. They left their names to the three double centuries of patrician knights.⁹ Their number appears also as a factor in the number of curiae, of senators, and of members of the great sacerdotal colleges. Other survivals may be found in the name "tribunus," in the tribuni militum, the tribuni

¹ Thus the three tribes of Cyrene were made up each of a nationality or group of nationalities (Hdt. iv. 161), and the ten tribes of Thurii were named after the nationalities of which they were respectively composed; Diod. xii. 11. 3.

² The Romans founded their colonies according to Etruscan rites, and they believed their city to have been established in the same way; Varro, *L. L.* v. 143; Cato, in Serv. in *Aen.* v. 755; Fest. 237. 18; Kornemann, in *Klio*, v. 88. The word Roma is now declared to be Etruscan; Schultze, *Lat. Eigennam.* 579 ff.; Schmidt, Karl Fr. W., in *Berl. Philol. Woch.* 1906. 1656.

³ Richter, *Top. d. Stadt Rom*, 30 ff., still believes that the earliest settlement was on the Palatine. His view is controverted by Degering, H., in *Berl. Philol. Woch.* xxiii (1903). 1645 f., who prefers the Quirinal; cf. also Carter, J. B., in *Am. Journ. of Archaeol.* xii (1908). 172-83.

⁴ Cf. Richter, *ibid.* 38; Meyer, E., in *Hermes*, xxx. 13.

⁵ Cf. Nissen, *Ital. Landesk.* ii. 504.

⁶ Cf. Varro, *L. L.* v. 55; Verrius Flaccus, in Gell. xviii. 7. 5. The idea of Isidorus, *Etym.* ix. 6. 7, is of course absurd.

⁷ This subject will be considered in connection with the Servian tribes; p. 48 f.

⁸ Dion. Hal. iv. 14. 2.

⁹ P. 74.

celerum,¹ the ludus Troiae,² and less certainly in the Sodales Titii.³

III. *The Curiae*

The curia as well as the tribe was a common Italian institution. We know that it belonged to the Etruscans,⁴ the Latins,⁵ and several other peoples of Italy.⁶ There were ten curiae to the tribe, making thirty in all.⁷ The association was composed, not of gentes as many have imagined, but of families.⁸ For the

¹ Like the Attic phylobasileis they continued through historical time to perform sacerdotal functions; Dion. Hal. ii. 64. 3; *Fast. Praen. Mar.* 19, in *CIL.* i². p. 234: "(Sali) faciunt in comitio saltu (adstantibus po)ntificibus et trib. celer;" Holzapfel, in *Beitr. z. alt. Gesch.* i. 242.

² Verg. *Aen.* v. 553 ff.; Serv. in *Aen.* v. 560; Holzapfel, *ibid.* 243.

³ P. 2, n. 6.

⁴ Fest. 285. 25; cf. Serv. in *Aen.* x. 202.

⁵ There were curiae in Lanuvium, an old Latin town; *CIL.* xiv. 2120. Juno Curis, Cur(r)itis, Quiritis, goddess of the curiae, was worshipped in Tibur (Serv. in *Aen.* i. 17), and in Falerii (Tertul. *Apol.* 24; *CIL.* xi. 3100, 3125, 3126; cf. Holzapfel, *Beitr. z. alt. Gesch.* i. 247; Roscher, *Lex. d. griech. u. röm. Myth.* II. i. 596 f.). A connection between Cūris and cūria is not clear; Deecke, *Falisker*, 86.

⁶ Aristotle, *Politics*, 1329, b 8, considers Italus, king of the Oenotrians, to have been author of the mess-associations (συσσίτια), adding that the institution was derived from the country of the Opici and the Chaonians. With the Opici he includes Latins as well as Ausonians; Dion. Hal. i. 72. 3. On the relation of these peoples to one another, see especially Pais, *Anc. Italy*, ch. i. Greek writers identify the curia with the phratry (Dion. Hal. ii. 7. 3 f.; Dio Cass. Frag. 4. 8), the *ἐραπεία*, and the *syssition* (Dion. Hal. ii. 23. 3; Dio Cass. *ibid.*). Although the institutions designated by these four names show considerable variety of form and function, they are similar in general character and may have a common origin; Meyer, *Gesch. d. Alt.* ii. 514.

The myth which names the curiae after the Sabine women suggests that some of the curial names, and perhaps the curiae themselves, might be found among the Sabines. On Rapta and Titia however see p. 11, n. 7.

⁷ Dion. Hal. ii. 7. 2; Dio Cass. Frag. 5. 8; Plut. *Rom.* 20; Fest. 174. 8; ep. 49; (Aurel. Vict.) *Vir.* III. ii. 12; Serv. in *Aen.* viii. 638; Pomponius, in *Dig.* i. 2. 2.

Soltau, *Altröm. Volksversamml.* 47 f., entertains the peculiar idea that the curiae, invented to counteract the independent tendencies of the tribes, were not divisions of the tribes, the members of each curia being drawn from all three tribes. His view is contradicted by the sources and he admits that he cannot prove it.

St. Augustine, *Enarr. in Psalm.* 121. 7 (iv. 2. 1624 ed. Migne), and still later Paulus, the epitomator of Festus, 54, suppose that there were thirty-five curiae. Notwithstanding Hoffmann, *Patr. u. pleb. Cur.* 44 ff., the opinion of these late writers doubtless arose from an identification of the curiae with the tribes; cf. Kübler, in Pauly-Wissowa, *Real-Encycl.* iv. 1818.

⁸ P. 11 f.

performance of its social and religious functions it had a house of assembly, also called *curia*,¹ in which the members — *curiales* — gathered for religious festivals. The place of meeting was a part of an edifice belonging to the collective *curiae*. In historical time there were two such buildings — the *Curiae Veteres*² on the northeast slope of the Palatine near the Arch of Constantine, containing seven curial meeting-places, and the *Novae Curiae*³ near the *Comptum Fabricium*, containing the others. Their deities were Juno⁴ and Tellus;⁵ and their chief festivals were the *Fornacalia* and the *Fordicidia*.⁶ As the worship was public, the expense was paid by the state.⁷ At the head of the *curia* stood the *curio* — who in historical time was merely a

¹ The word is derived from **co-viria*, "a dwelling together," "an assembly," by Pott, *Etym. Forsch.* ii. 373 f. (cf. Vaniček, *Etym. Wörterb. d. lat. Spr.* 160; Walde, *Lat. etym. Wörterb.* 161), who is followed by Schwegler, *Röm. Gesch.* i. 496, n. 8, 610, n. 4; Herzog, *Röm. Staatsverf.* i. 96. Mommsen, *Röm. Staatsr.* iii. 5, 90 and notes, gives the word the meaning "an association of citizens," deriving it from *quiris* (cf. *Abriss*, i. 11), which he connects with *kúpos*, *κύριος*, as did Lange in 1853 (*Kleine Schriften*, i. 147). Afterward — *Röm. All.* i. (1876) 91 — Lange expressed some doubt as to this connection. But the fact that *curia* applies to the house not only of the *curiales*, but also of the senate and of the *Salii*, as well as to various other buildings, seems to indicate that the meaning "house" is primary for the Latin language if not ultimately original. Corssen, who accepts this meaning, derives *cu-* from *sku-*, "to cover," "to protect" (*Ausspr.* i. 353 f.; Vaniček, *Griech.-lat. etym. Wörterb.* 1116), cf. Old High Germ. *hū-t*, *hū-s*, Eng. "house." Although Mommsen, *Röm. Staatsr.* iii. 90, n. 2, protests against this explanation, it is accepted by Meyer, *Gesch. d. All.* ii. 511, Soltau, *Altröm. Volksversammlung* 52, and others. Far less probable is a connection with *cura*, *curare*, assumed by most ancient writers; cf. Varro, *L. L.* v. 155; vi. 46; *Vit. pop. rom.* in Non. Marc. 57; Fest. ep. 49; Pomponius, in *Dig.* i. 2. 2. 2; Dio Cass. Frag. 5. 8; Isid. *Etym.* xv. 2. 28. These sources have misled Genz, *Patr. Rom.* 32, into fruitless speculation on the functions of the *curia*.

² Tac. *Ann.* xii. 24.

³ Fest. 174. 6; Jordan, *Top. d. Stadt Rom*, I. i. 165 f.; iii. 43 f.; Gilbert, *Gesch. u. Top. d. Stadt Rom*, i. 102 f.; 195 ff.; Richter, *Top. d. Stadt Rom*, 33, 340; Lanciani, *Ruins and Excavations of Ancient Rome*, map opp. 58; Mommsen, *Röm. Staatsr.* iii. 99.

⁴ P. 8, n. 5; Dion. Hal. ii. 50. 3; Fest. 254. 25; ep. 64; cf. Roscher, *Lex.* II. i. 596.

⁵ Worshipped in the *Fordicidia*; Ovid, *Fast.* iv. 634; Lyd. *De Mens.* iv. 49; Wissowa, *Rel. u. Kult. d. Röm.* 159.

⁶ On the curial worship, see Varro, *L. L.* vi. 13; Fest. 254. 25; 317. 12; Dion. Hal. ii. 23. 1-3; 50. 3; 65. 4; Ovid, *Fast.* ii. 527 ff.; iv. 629 ff.; Plut. *Q. R.* 89; cf. Fowler, *Roman Festivals*, 71-2, 302-6. On the *stultorum feriae*, see Wissowa, *ibid.* 142; Fowler, *ibid.* 304 ff.

⁷ Dion. Hal. ii. 23. 1; Fest. 245. 28.

priest¹—assisted in his religious functions by his wife and children,² by a lictor³ and a flamen.⁴ The fact that the curio had these officials proves that he was originally a magistrate.⁵ One of the curiones the people elected curio maximus to exercise general supervision over the worship and festivals of the association.⁶

Another function of the curiae was political. The grown male members, meeting in the comitium, constituted the earliest assembly organized in voting divisions—the comitia curiata—in which each curia cast a single vote.⁷ Religious and political functions the curia continued to exercise far down into historical time; and for that reason they have never been doubted by the moderns. For the primitive period Dionysius⁸ ascribes to them military functions as well. His idea is that the three original tribes furnished military divisions each under a tribune, and the curiae as subdivisions of the tribe furnished companies, commanded each by a curio chosen for his valor.⁹ Doubtless the writer fairly describes the military system which Rome employed before the introduction of the phalanx,¹⁰ and which cor-

¹ Varro, *L. L.* v. 83; vi. 46; Dion. Hal. 64. 1; 65. 4; Fest. ep. 49, 62; Lyd. *De Mag.* i. 9.

² Dion. Hal. ii. 22. 1.

³ *CIL.* vi. 1892; xiv. 296; Gell. xv. 27. 2; cf. Cic. *Leg. Agr.* ii. 12. 31.

⁴ Fest. ep. 64: "Curiales flamines curiarum sacerdotes." For the flamen of the Curia Iovis of Simithus, see *CIL.* viii. 14683; cf. 2596 and 11008. The statement of Festus, 154. 26, that there were but fifteen flamines must be modified. But there may have been fewer than thirty curial flamines; Mommsen, *Röm. Staatsr.* i. 390. Of the two curial officials mentioned by Dionysius, ii. 21. 2, therefore, one was the curio and the other a lictor (Mommsen, *ibid.* 309, n. 5; Genz, *Patr. Rom.* 47) or a flamen (Holzapfel, in *Beitr. z. alt. Gesch.* i. 242).

⁵ Cf. Wissowa, *Rel. u. Kult. d. Röm.* 338, n. 3, 413, n. 2.

⁶ Livy iii. 7. 7; xxvii. 8. 1; Fest. ep. 126. This official was probably instituted after the curiones had become mere priests; Genz, *ibid.* 48.

⁷ P. 157. The comitium was a place of assembly adjoining the Forum.

⁸ II. 7. 2 f.; 23. 3.

⁹ Soltau, *Altrom. Volksversamml.* 52, 65, following J. J. Muller, in *Philol.* xxxiv (1874). 96–136, refuses to credit a military character to the curiae because it is mentioned by no other writer and because we can find no trace of it in historical time. His reasoning is not cogent. The curia may have lost its earlier military function, as did the phratry (*II.* ii. 362 f.).

¹⁰ That the antiquarians had some evidence as to the military character of the curiae is suggested by Fest. ep. 54: "Centuriata comitia item curiata dicebantur, quia populus Romanus per cetenas turmas divisus erat."

responds closely with the system prevalent among the early Greeks,¹ Germans,² and other European peoples.³ The military organization was everywhere a parallel of the civil. The Roman army, however, was by no means identical with the curiate assembly, for many belonged to the tribes and the curiae who for various reasons were exempt from military service.⁴

It is probable, too, that the curiae, as well as the tribes,⁵ were territorial divisions. Not only have we the authority of Dionysius⁶ that each curia occupied a district of the state, but also two of the seven known curial names — *Foriensis* and *Veliensis*⁷ — are local. Though the two mentioned refer to places within the city, the country people were also included in the associations.⁸

Since Niebuhr the opinion has generally prevailed that the curia was composed of gentes. A passage which at first glance seems to have a bearing on the question is *Dion. Hal. ii. 7. 4*: "Romulus divided the curiae into decades, each commanded by a

¹ *Il. ii. 362 f.*

² *Tac. Germ. 7. 3.*

³ Schrader, *Reallex.* 349 f.

⁴ All adult male citizens had a right to attend this assembly, all who were physically qualified and of military age were liable to service when called to it; but probably on no occasion were those present in the assembly identical with the military levy of the year; cf. p. 203.

⁵ *P. 7.*

⁶ *Il. 7. 4.* The curiales must have been neighbors in order to use a common drying oven; n. 8 below.

⁷ *Fest. 174. 12.* The first is evidently named after the Forum, the second after the Velia; cf. *Plut. Rom. 20*, who states that many were named after places. Of the other five *Velitia* (*Fest. ibid.*), *Titia* (*ibid. ep. 366*), *Faucia* (*Livy ix. 38. 15*), and *Acculeia* (*Varro, L. L. vi. 23*) have gentile endings. We should not imagine these four to be named after gentes, which were of later origin; Botsford, in *Pol. Sci. Quart.* xxi. (1907). 685 ff. It would be safer to assume that they, like gentilicia, are derived from the names of persons real or imaginary. *Rapta* (*Fest. 174. 12*) and *Titia* possibly suggested to the ancients the derivation of the curial names from those of the captive Sabine women; cf. p. 8, n. 6.

⁸ *Dion. Hal. iv. 12. 2.* This statement is confirmed by the nature of the *Fornacalia*, the chief festival of the curiae; it was celebrated in connection with the drying of the far in ovens; *Pliny N. H. xviii. 2. 8*; *Fest. ep. 83, 93*. Evidently the members of a curia were those who had a common drying oven; *Wissowa, Rel. u. Kult. d. Röm.* 142.

leader, who in the language of the country is called decurion."¹ The word decurion proves, however, that in speaking of decades Dionysius is thinking of the military divisions called decuriae, each commanded by a decurion. In historical times the troop of cavalry — turma — was divided into three decuriae of ten each, as the word itself indicates. There were accordingly three decurions to the turma, and ten turmae ordinarily went with the legion.² From Varro³ we learn that the three primitive tribes furnished turmae and decuriae of cavalry, the decuriae commanded by decurions. Dionysius accordingly refers to military companies — either to the well known decuriae of cavalry or to corresponding companies of footmen which probably existed before the adoption of the phalanx.⁴ Had he meant gentes, he would have used the corresponding Greek word γένη. Niebuhr⁵ inferred from this passage that each curia was divided into ten gentes, making three hundred gentes for the entire state; but a careful interpretation shows that no reference to the gentes is intended. We cannot infer therefore from this citation that the curia was divided into gentes.

The other passage relative to the question is Gellius xv. 27. 4,⁶ in which Laelius Felix states that the voting in the comitia curiata was by genera hominum in contrast with the census et aetas of the centuriate assembly and with the regiones et loca of the comitia tributa. Niebuhr identifies genera with gentes.⁷ It is clear, however, that in this passage Laelius is not concretely defining the voting units of the various assemblies, but is stating in a general way the principles underlying their

¹ Διήρηνται δὲ καὶ εἰς δεκάδας αἱ φράτριάς, πρὸς αὐτοῦ, καὶ ἡγεμῶν ἐκάστην ἐκόσμευε δεκάδα, δεκουρίων κατὰ τὴν ἐπιχώριον γλῶτταν προσαγορευόμενος.

² Polyb. vi. 25. 1; cf. 20. 9.

³ L. L. v. 91.

⁴ There is no need of assuming, with Bloch, *Origines du sénat Romain*, 102-5, that the decuriae mentioned by Dionysius are "purely imaginary."

⁵ *Röm. Gesch.* i. 334 f.; Eng. 163; cf. also Schwegler, *Röm. Gesch.* i. 612 f. The antiquated view is still held by Herzog, *Röm. Staatsverf.* i. 96, and by L'écrivain, in Daremberg et Saglio, *Dict.* ii. 1504. Though Ihne, *History of Rome*, i. 113, n. 3, believes that the curiae were composed of gentes, he is doubtful as to the number.

⁶ "Cum ex generibus hominum suffragium feratur, curiata comitia esse; cum ex censu et aetate, centuriata; cum ex regionibus et locis, tributa."

⁷ Mommsen, too, supposes that genera here means gentes but is used so as to include also the plebeian stirpes; nevertheless he knows that the voting in the curiate assembly was by heads rather than by gentes; *Röm. Staatsr.* iii. 9, n. 2; 90, n. 5.

organization into voting units. In the *comitia centuriata* the principle is wealth and age; *census et aetas* is not to be identified with *centuria* or with any other group of individuals in this assembly. In like manner *regiones et loca* expresses the principle of organization of the tribal assembly; or if used concretely, it must designate the tribes themselves, and not subdivisions of the tribes, for none existed. Correspondingly *genera hominum* signifies that the principle of organization of the curiate assembly is hereditary connection; but so far as the expression is applied concretely, it must denote the *curiae* themselves not subdivisions of these associations. The *curia*, a religious, social, and political group based on birth, might well be called *genus hominum* in contrast with the local tribe and with the century, composed artificially of men of similar wealth and age. It is well known, too, that voting within the *curiae* was not by *gentes* but by heads.¹ As no other passage from the sources, besides these two, has even the appearance of lending support to the proposition advanced by Niebuhr, and favored by others, that the *curia* was a group of *gentes*, we may conclude that this proposition is groundless. The result is that the *gens* had no connection with the comitial organization.

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¹ Livy i. 43. 10: "Viritim suffragium . . . omnibus datum est" (i.e. in the curiate assembly). This statement of the lack of relation between the *gens* and the *curia* is repeated from *Pol. Sci. Quart.* xxi. 511 f.

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CHAPTER II

THE SOCIAL COMPOSITION OF THE PRIMITIVE POPULUS

THIS chapter¹ is primarily an inquiry into the social composition of the *comitia curiata*. At the same time it seeks to solve a problem which is doubtless the most fundamental in the early political and constitutional history of Rome. The result we reach will determine our conception of the whole course of constitutional development, and of the accompanying political struggles, to the complete equalization of the social ranks. For if we believe, as do many of the moderns,² that the primitive Roman state was made up exclusively of patricians, we are forced to the conclusion that the constitutional development to the passing of the Hortensian laws centred in the gradual admission of the plebeians and the clients to citizenship—perhaps even in the amalgamation of two distinct peoples. If on the other hand we take the ground that from the beginning the plebeians and the clients were citizens and voted in the *comitia curiata*, we must think of these inferior classes as struggling through the early history of their country for the acquisition not of citizenship but of various rights and privileges, social, economic, religious, and political, formerly monopolized by a patrician aristocracy. In attempting to solve the problem here proposed it will be advantageous to consider (1) the ancient view, (2) the conventional modern view, (3) the comparative-sociological view.

I. *The Ancient View*

The three social classes of freemen—plebeians, patricians, and clients—were formed within the citizen body by official recognition of existing distinctions not of nationality but of worth. The first step in the process was the differentiation of

¹ It is in the main a reproduction of my article on the subject in *Pol. Sci. Quart.* xxi (1906). 498–526.

² P. 25 ff.

the patricians from the plebeians. According to Cicero, Romulus constituted a number of chief men into a royal council, the senate, whose members he so highly esteemed as to have them called *patres*, and their children patricians.¹ Cicero thinks of the multitude as existing at first without a politically recognized nobility, yet showing natural distinctions of worth. By calling into the senate the ablest and best men, the state ennobled them and their families.² Livy's³ view is similar: Romulus selected from the multitude a hundred senators, whom he named *patres*, and whose descendants were called patricians. They were chosen because of their wisdom;⁴ on that ground the state granted them nobility,⁵ which accordingly in Rome, as in every early community, was founded on personal merit.⁶ In the more detailed theory of Dionysius,⁷ Romulus "distinguished those who were eminent for their birth and celebrated for their virtue, and whom he knew to be rich in the account of those times and who had children, from the obscure and mean and poor. The lower class he called plebeians, Greek *δημοτικοί*, and the higher *patres*, either because they were older than the others, or had children, or were of higher birth, or for all these reasons. . . . The most trustworthy historians of the Roman constitution assert that owing to these facts they were called *patres* and their descendants patricians." According to Plutarch,⁸ "Romulus, after forming the army, employed the rest of the people as the citizen body (*δημος*); the multitude he called

¹ *Rep.* ii. 8. 14; 12. 23: "Senatus, qui constabat ex optimatibus, quibus ipse rex tantum tribuisset, ut eos *patres* vellet nominari patricosque eorum liberos."

² In the expression "omnibus patriciis, omnibus antiquissimis civibus," Cicero (*Caec.* 35. 101) intends no more than to include the patricians among the oldest citizens, whom he is contrasting with the newly-admitted municipes. Only the most superficial examination of the passage (cf. Willems, *Sén. Rom.* i. 7) could make "omnibus patriciis" equivalent to "omnibus antiquissimis civibus."

³ I. 8. 7.

⁴ *Ibid.*: "Consilium deinde viribus parat: centum creat senatores."

⁵ Livy iv. 4. 7: "Nobilitatem istam vestram quam plerique oriundi ex Albanis et Sabinis non genere nec sanguine sed per coöptionem in *patres* habetis, aut ab rebus lecti aut post reges exactos iussu populi."

⁶ Livy i. 34. 6: "In novo populo, ubi omnis repentina atque ex virtute nobilitas sit."

⁷ II. 8. 1-3. In 12. 1, he shifts his point of view: Romulus chose the hundred original senators from the patricians.

⁸ *Rom.* 13; cf. *Q. R.* 58.

populus, and appointed a hundred nobles to be councillors, whom he called patricians, and their assembly the senate.¹

There can be no doubt, therefore, as to the opinion of the ancient writers. They believed that from the beginning social distinctions existed naturally within the *populus Romanus*, and that these distinctions were made the basis of an official division of the people into nobles and commons, *patricii* and *plebs*, by the government. This view is not only reasonable in itself, but is supported, as we shall see, by analogies drawn from many other states.

All the sources make the patriciate depend upon connection with the senate, Dionysius alone showing some inconsistency on this point.² Why the senators were called *patres* the ancients give various reasons. Cicero³ thinks *patres* a term of endearment; Sallust⁴ believes that the name was applied either because of age or because of the similarity of their duty; Livy⁵ sets it down as a title of honor; Festus⁶ thinks chiefly of their age and wisdom; Paulus,⁷ his epitomator, suggests that they were so called because they divided their lands among the poorer class as fathers among children; Dionysius⁸ gives three possible reasons, (1) greater age, (2) possession of children, (3) family reputation. The sources generally agree in representing the *patres* as men who in age, honor, authority and duty stood toward the rest of the citizens as a father toward his children, and in identifying these social-political *patres* with the

¹ Cf. further Ovid, *Fast.* iii. 127; Vell. i. 8. 6; Fest. 246. 23; 339. 11.

² There is no inconsistency, however, in the fact that some noble *gentes* claimed descent from Aeneas or from deities (cf. Seeley, *Livy*, 57) or from Alban or Sabine ancestors (cf. Livy i. 30. 2; iv. 4. 7; Dion. Hal. ii. 46. 3; iii. 29. 7); they were nobles in their original homes before the founding of Rome, but became patricians by an act only of the Roman government.

Although after the creation of the first hundred *patres*, the ancients do not distinctly state that each newly-made senator was the founder of a new patrician family, they do represent the enlargement of the senate and of the patriciate as going hand in hand; in this way they continue to make the patriciate depend upon membership in the senate; cf. Livy i. 30. 2; 35. 6; Dion. Hal. ii. 47. 1; iii. 67. 1; Madvig, *Röm. Staat.* i. 75.

³ *Rep.*, ii. 8. 14; cf. (Aurel. Vict.) *Vir.* III. ii. 11.

⁴ *Cat.* 6. 6; cf. Isid. *Etym.* ix. 6. 10: "Nam sicut patres suos, ita illi rem publicam habebant" (or "alebant").

⁵ I. 8. 7.

⁶ 339. 11.

⁷ 247.

⁸ ii. 8. 1.

senators.¹ An examination of the word itself will tend to confirm the ancient view. It seems to have originally signified "protector," "keeper," "nourisher,"² hence "owner," "master." *Pater familias* is nourisher, protector, and master of a household.³ In late Roman law the term continued to refer not necessarily to actual parentage but rather to the legal position of the head of a household;⁴ in fact it is only in a distantly derived sense that *pater* comes to signify the male parent. Ideas early attaching to the word, accordingly, are those of power or authority and age. The senate, as this word indicates, was originally made up of elderly men, *senatores, maiores natu*.⁵ It would be natural to call them *patres* because of their authority over the community or of their age. As a designation of rank, *pater*, excepting in jest, is always plural—an indication that the authority and dignity did not attach to the individual noble but to the senators collectively; they were collectively *patres* of the community, not individually *patres* of children, clients or *gentes*.⁶ But when in time a limited number of families monopolized the senate, the term could easily be extended to the entire privileged circle, meaning those with hereditary right to authority over the rest of the community.⁷ Though in the sources the *patres* are generally senators the word is sometimes synonymous with *patricii*.⁸

¹ Cf. Mommsen, *Röm. Forsch.* i. 227.

² From the root *pa*, to protect, preserve, conservare; Pott, *Wurzel-Wörterb. d. Indog. Spr.* (2d ed.), 221; Corssen, *Ausspr.* i. 424; Schrader, *Sprachvergl. u. Urgesch.* 538; Lécrivain, in Daremberg et Saglio, *Dict.* ii. 1507.

³ *Dig.* i. 16. 195. 2: "*Pater familias appellatur qui in domo dominium habet.*" In like manner *patronus* is protector of clients, *pater patriae* protector of his country; Pott, *ibid.* 227.

⁴ Ulpian, in *Dig.*, *ibid.*: "*Pater autem familias recte hoc nomine appellatur, quamvis filium non habeat; non enim solam personam eius, sed et ius demonstramus: denique et pupillum patrem familias appellamus.*"

⁵ *Livy* i. 32. 10 (from a fœtal formula).

⁶ Rubino, *Röm. Verfassung und Geschichte*, 186; Mommsen, *Röm. Forsch.* i. 228, n. 16.

⁷ In the same way *reges* is made to include the whole family of the rex; *Livy* i. 39. 2. For other illustrations of the same principle, see Rubino, *ibid.* 188, n. 1.

⁸ The Twelve Tables seem to apply it to all patricians, not to senators alone: Cicero, *Rep.* ii. 37. 63: "*Conubia . . . ut ne plebei cum patribus essent;*" *Livy* iv. 4. 5: "*Ne conubium patribus cum plebe esset.*" These passages, however, do not afford absolute proof; for Gaius, bk. vi *ad legem Duodecim Tabularum* (*Dig.* i. 16.

Regarding *patricius* the Romans reasoned with somewhat less care. They were right in deriving it from *pater*, but they made it signify "descended from," whereas in fact it means "belonging to,"¹ and designates accordingly the families of the political *patres*. Probably it was formed after *patres* began to be applied to the entire governing class — a development which would tend to throw the latter word back to its earlier and narrower sense.

Had the investigation of these words on the part of the ancients rested at this point, all would have been well; but an unfortunate guess as to the derivation of *patricii* by some unknown antiquarian has brought into the study of the social ranks unutterable confusion lasting down to the present day. This conjecture derives *patricius* from *patrem ciere*, making it signify "one who can cite a father." The attempted etymology, clearly a failure, would perhaps have been harmless, had it not connected itself with the ambiguous word *ingenuus*. *Cincius*² says, "Those used to be called patricians who are now called *ingenui*." Livy has the two ideas in mind when he represents a plebeian orator as inquiring, "Have ye never heard it said that those first created patricians were not beings sent down from heaven, but such as could cite their fathers, that is, nothing more than *ingenui*? I can now cite my father — a consul — and my son will be able to cite a grandfather."³ There should be no doubt as to the meaning of these passages; the antiquarian who conjectured that *patricius* was derived from *patrem ciere*, and therefore defined *patricii* as those who could cite

238: "*Plebs est ceteri cives sine senatoribus*"), probably commenting on the very law quoted by Cicero and Livy, seems to understand *patres* as senators; cf. the prohibition of intermarriage between senators and their agnatic descendants on the one hand and freed persons on the other; *Dig.* xxii. 2. 44; Roby, *Rom. Priv. Law*, i. 130; Vassiss, in *Athena*, xii. 57 f. In some instances, however, as in the expression "*a patribus transire ad plebem*" (*Vell.* ii. 45. 1) *patres* is certainly equivalent to *patricii*.

¹ Cf. *gentilicius* from *gentilis*; *tribunicus* from *tribunus*, Pott, *ibid.* 227. *Patricius* is an adjective signifying paternal, ancestral, belonging to parents or progenitors; Corssen, *ibid.* i. 53.

² In his work on the *Comitia*, quoted by Fest. 241. 21: "*Patricios eos appellari solitos qui nunc ingenui vocentur.*"

³ X. 8. 10: "En umquam fando audistis patricios primo esse factos non de caelo demissos, sed qui patrem ciere possent, id est nihil ultra quam ingenuos . . . ?"

their fathers, meant merely those who had distinguished fathers, and hence were of respectable birth. Ordinarily in extant Latin literature ingenui are simply the freeborn; and in making Appius Claudius Crassus in 368 include in the term the whole body of citizens Livy¹ dates this meaning back to the period before the Licinian-Sextian laws. Elsewhere are indications that in early times ingenui connoted rather respectable birth, and so applied especially to the patricians.² The quotations from Cincius and the attempted derivation of patricius from patrem ciere, accordingly, are sufficiently explained without resorting to the strange hypothesis, held by some, that in primitive Rome the patricians were the only men of free birth.

In summarizing the ancient view as to the origin and nature of the patriciate, it will be enough to say that the king chose from the people men who were eminent for the experience of age, for ability and reputation, to sit in his council, the senate; the men so distinguished were called patres, whereas the adjective patricius applied as well to their families—the patricii being those who could cite illustrious fathers.³ From this point of view the Roman nobility did not differ from that of most other countries.

The plebs,⁴ then, were the mass of common freemen, from whom the nobility was differentiated in the way described above.

¹ VI. 40. 6. The speaker contrasts ingenui with patricii.

² Plut. *Q. R.* 58: Those who were first constituted senators by Romulus were called patres and patricii as being men of good birth, who could show their pedigree. In its adjectival and adverbial uses ingenuus connotes not the quality of free birth, but respectability, nobility. The original meaning is "born within," hence indigenous, native; cf. Forcellini, *Totius Latinitatis Lexicon*, s. v. In this sense it could not apply to the patricians, who generally claimed a foreign origin. But native is superior to alien; doubtless in this secondary meaning of excellence it attached to the nobility, the close relation of the word to gens (family, lineage) attracting it in that direction. Afterward it was so democratized as to include all the freeborn. With this meaning we find it as early as Plautus, *Mil.* 784, 961. According to Dionysius, ii. 8. 3, the identification of patricii with ingenui in its sense of freeborn was accepted not by the most trustworthy historians, but by certain malicious slanderers: "Some say they were called patricians because they alone could cite their fathers, the rest being fugitives and unable to cite free fathers."

³ P. 30.

⁴ The word is probably derived from the same root as populus; Corssen, *Ausspr.* i. 368; cf. p. 1, n. 3 above.

From the ancient point of view they existed from the beginning, prior even to the patriciate itself.

It is equally true that in the opinion of the ancients the plebs were prior to the clients. Cicero¹ records that Romulus distributed the plebs in clientage among the chief men; Dionysius² adds that he gave the plebeians liberty to choose their patrons from among the patricians. Thus far their view is in complete accord with modern sociology, which teaches that such class distinctions first arise through the differentiation of freemen. Although aware of the fact that clientage existed in other states which were presumably older than Rome,³ her historians doubtless felt that the institution could have been legalized in their own country by recognition only on the part of the government. They did not, however, work out a consistent theory of the relation between this class and the plebeians. Certain passages⁴ hint, though they do not expressly assert, that at one epoch all the plebeians were in clientage, whereas in their accounts of political struggles the ancient writers uniformly array clients against plebeians almost from the beginning of the state.⁵ The latter view is historically better founded.

There must have been various origins of clientage, with corresponding gradations of privilege. The *libertini* were citizens with straitly limited rights; other clients, certainly the greater part of the class, not only followed their patron to war⁶ and to the forum,⁷ but also testified and brought accusations in the courts⁸ and voted in the assemblies;⁹ and when the plebeians gained the right to hold offices the clients were admitted along with them to the same privilege.¹⁰ In his relation with the state,

¹ *Rep.* ii. 9. 16.

² ii. 9. 2.

³ Notably among the Sabines, *Livy* ii. 16. 4; *Dion. Hal.* ii. 46. 3.

⁴ Cicero, *Rep.* ii. 9. 16; *Dion. Hal.* ii. 9. 2.

⁵ Cf. the citations in Mommsen, *Röm. Staatsr.* iii. 71, n. 1. Dionysius, ii. 63. 3, distinguished the two classes as early as the interregnum which followed Romulus.

⁶ *Dion. Hal.* v. 40. 3; vi. 47. 1; vii. 19. 2; x. 43. As late as 134 Scipio called his clients to follow him to the Numantine war; Appian, *Iber.* 84.

⁷ *Livy* iii. 58. 1.

⁸ *Dion. Hal.* ii. 10. 3.

⁹ *Livy* ii. 56. 3; 64. 2; *Dion. Hal.* ii. 10. 3; iv. 23. 6; ix. 41. 5.

¹⁰ *Dion. Hal.* ii. 10. 3 (it was not lawful for either patron or client to vote against the other). Marius, a client of Herennius, was elected to the praetorship; *Plut. Mar.* 5. A law declared that election to a curule office (according to Plutarch, or

therefore, the ordinary client did not differ essentially from the plebeian.

From the preceding examination of the social ranks it at once becomes evident that the ancients made the *populus* comprise both patricians and plebeians; in further proof of their view may be cited the following juristic definition: "Plebs differs from *populus* in that by the word *populus* all the citizens are meant, including even the patricians, whereas *plebs* signifies the rest of the citizens, excepting the patricians."¹ Since the sources generally consider the patricians the descendants of the hundred original senators,² they cannot help regarding the *populus* as composed chiefly of plebeians. In common speech the term, like our word *people*, often applies to the lower class as distinguished from the higher, in which sense it is interchangeable with *plebs*; often, too, it signifies the people in contrast with the senate.³ It is clear, then, as Mommsen has pointed out,⁴ that if *populus* signifies first the whole body of citizens and secondly the commons as distinguished from the nobles, it could not possibly have as a third equivalent the patricians as distinguished from the plebeians. In certain formulae found in addresses, wills, prayers, and oracles, *populus* is so joined with *plebs* (*populus plebesque* or the like) as to suggest the possible

as Marius asserted to any office) freed a man and his family from clientage. Evidently this law was passed in or after 367 B.C. Mucius, a client of Ti. Gracchus, was elected to the plebeian tribunate; Plut. *Ti. Gracch.* 13. Cn. Flavius, who was the son of a freedman and probably therefore a client, was elected curule aedile for 304; Livy ix. 46. 1; Val. Max. ii. 5. 2.

¹ Gaius 1. 3: "Plebs autem a populo eo distat, quod populi appellatione universi cives significantur connumeratis etiam patriciis; plebis autem appellatione sine patriciis ceteri cives significantur." Evidently Pomponius held the same view; *Dig.* i. 2. 2. 1-6; cf. Capito, in Gell. x. 20. 5; Fest. 233. 29; 330. 19; Isid. *Etym.* ix. 6. 5 f.; Mommsen, *Röm. Staatsr.* iii. 4, n. 2.

² Cicero, *Rep.* ii. 12. 23; Livy i. 8. 7; Zon. vii. 9; Isid. *Etym.* ix. 6. 6.

³ Illustrations of this common use are Cicero, *Rep.* ii. 8. 14; 12. 23; Livy ii. 54. 3; iv. 51. 3; x. 13. 9; xxv. 2. 9; 3. 13; 3. 16; xxx. 27. 3; xxxiv. 54. 4; xxxvii. 58. 1; xliii. 8. 9. The Greeks always regard *populus* as the equivalent of *δῆμος*; cf. Plut. *Rom.* 13. Not only does the tribune in addressing the plebs call them *populus Romanus* (Sall. *Jug.* 31), but the consuls also apply the term to the same class (Livy xxv. 4. 4); and a statement of Cicero (*Leg. Agr.* ii. 7. 17), which has the appearance of a legal definition, makes the people of the thirty-five tribes under a tribune the *universus populus Romanus*.

⁴ *Röm. Forsch.* i. 172.

meaning patricians.¹ The combination of the two words with *senatus*,² however, reveals at once the overlapping of the terms so joined. In these passages reference is to the modes by which an individual may approach the state; he may address the consuls, praetors, or plebeian tribunes, and in the same way the senate, *populus*, or *plebs*.³ Hence in these formulae, merely representing groups of institutions through which the state is accustomed to act, the word *populus* does not apply solely to the patricians, and the same may be said of its use in all other connections. We may conclude, therefore, that the Latin language gives no hint of an exclusively patrician *populus*.

Regarding the *populus* as made up of patricians, plebeians, and clients, our sources necessarily ascribe the same social composition to its divisions, the three old tribes and the thirty *curiae*.⁴ With perfect consistency they mention repeated enlargements of the *populus* and of the tribes and *curiae*, through the admission of masses of aliens, most of whom must have remained plebeian. In fact the sources uniformly represent all the kings as freely admitting conquered aliens without exception to the citizenship and to the tribes and the *curiae*, even compelling some forcibly to enter this condition.⁵

Might the plebeians and clients belong in a restricted sense to the *populus* and *curiae*, and yet remain so far inferior to the patricians as to be excluded from the political meetings of the *curiae* — the *comitia curiata*? There can be no uncertainty as to the answer to this question, for the ancient writers agree that the *comitia curiata* included plebeians and clients as well as

¹ Cic. *Fam.* x. 35; *Verr.* v. 14. 36; *Mur.* i. 1; Livy xxix. 27. 2; Tac. *Ann.* i. 8; Macrobian. *Sat.* i. 17. 28; cf. Mommsen, *Röm. Forsch.* i. 169, n. 4.

² E.g. *senatui populo plebique Romanae*; Cicero, *Fam.* x. 35 (address).

³ Mommsen, *Röm. Staatsr.* iii. 6, n. 4; Soltau, *Altröm. Volksversamml.* 84.

⁴ For the division of the *populus* into tribes and *curiae*, see Cic. *Rep.* ii. 8. 14; Livy i. 13. 6; Dion. Hal. ii. 7. 2; App. *B. C.* iii. 94. The author of *Vir. Ill.* 2. 12, in supposing that the *plebs* alone were assigned to the tribes is certainly wrong; but his mistake is pardonable in view of the general agreement among our sources that the *populus*, *πληθος*, contained in the *curiae* were mainly plebeian.

⁵ Cic. *Rep.* ii. 7. 13; 8. 14; 18. 33; Livy i. 13. 4; 13. 6; 28. 7; 30. 1; 33. 1-5; Dion. Hal. ii. 46. 2 f.; 47. 1; 50. 4 f.; 55. 6; iii. 29. 7; 30. 3; 31. 3; 37. 4; 48. 2; iv. 22. 3.

patricians.¹ Not only did the lower classes attend this assembly, but they also voted in it, and constituted the majority.²

II. *The Conventional Modern View*

The passages cited above suffice to prove that the ancient writers thought of the *populus*, and consequently of the *comitia curiata*, as composed from the earliest times of patricians, clients, and plebeians. Another question, far more difficult, is whether the ancients were right in their view.

As none of the authorities on whom we directly depend for our knowledge of Roman affairs lived earlier than the last century of the republic, they could have had no first-hand acquaintance with primitive Roman conditions, but must have drawn their information concerning the remote past from earlier writers — the annalists — now lost. Niebuhr, who in the opening years of the last century introduced the modern method of investigating Roman history, was convinced that writers of the late republic and of the empire, lacking historical perspective and interpreting their sources in the false light of existing or recent conditions, came to wrong conclusions in regard to the primitive Roman state. He believed he could point to instances of such misunderstanding, and he thought it within the power of a well-equipped modern historian to eliminate much of the error so as to come near to the standpoint of the earlier and more trustworthy annalists.³

The position of Niebuhr has in the main proved untenable. Notwithstanding all the source-sifting of modern times, pursued most zealously by the Germans, we are obliged to admit that it is rarely possible with any fair degree of certainty to discover the view of an annalist on a given subject excepting in the few cases in which the citation is by name. We must also

¹ Cf. Dion. Hal. ii. 8. 4.

² Livy i. 17. 11; 35. 2; 43. 10; 46. 1; Dion. Hal. ii. 10. 3; 14. 3; 60. 3; 62. 3; iv. 12. 3; 20. 2.

³ Cf. *Lectures on the History of Rome*, i. 80, 83: "I beg you to mark this well . . . that even ingenious and learned men like Livy and Dionysius did not comprehend the ancient institutions and yet have preserved a number of expressions from their predecessors from which we, with much labor and difficulty, may elicit the truth."

admit that though Cicero and the Augustan writers might misinterpret Fabius Pictor in minor details, it is inconceivable that they should fail to understand his presentation of so fundamental a subject as the character of the original *populus* or the composition of the earliest assembly. Present scholarship accordingly insists that in such weighty matters there was no essential difference of view between earlier and later writers.¹

These considerations have simplified but not solved the problem. Scholars now agree that no contemporary account of the regal period—ending 509 (?) B.C.—ever existed; and even if it be conceded that the earliest Roman annalist—Fabius Pictor, born about 250 B.C.—had access to traditional or documentary² information reaching back to the close of that period, no historian will admit such a possibility for the beginnings of Rome. It follows then that for the origin and character of her earliest institutions Cicero, Livy, and Dionysius, or their sources, have relied wholly on inference from later conditions, in so far as they have not resorted to outright invention. Though with their abundant material they were in a far better position for making such deductions than we are, they lacked the experience and the acute critical method of the moderns.³ Of the three writers above mentioned—our main sources for the subject under discussion—Cicero was essentially an orator, Dionysius a rhetorician, and Livy, though historian in name, was in spirit rhetorical and dramatic rather than critical. Naturally therefore they or their sources, who on the whole were equally uncritical, made mistakes in the difficult work of drawing inferences as to the history and institutions of the regal period. Such is the view of historians today. It was formerly argued that Dionysius, a rhetorician and a Greek, failed in spite of his twenty-two years of preparation at Rome to understand the

¹ The school of Mommsen, which still clings to Niebuhr's theory of an exclusively patrician *populus*, has abandoned the attempt to support it by a reconstruction of lost sources.

² The late regal period may have left a few documents which, if used by the annalists, might have thrown light on the condition of that time. It has not yet been determined whether the inscription recently found in the Roman Forum belongs to the late regal or to the early republican period.

³ Mommsen, *Röm. Staatsr.* iii. 69, grants to the ancients far more knowledge of their own history, but claims a "wider horizon."

spirit and character of the Roman constitution and has therefore been an especial fountain of error;¹ but it is now clear that though in his treatment of early Rome he shows far greater amplitude than Livy and is for that reason proportionally more liable to error in detail, he follows good Roman sources for institutions, and is in this field, with the reservation here mentioned, not essentially inferior to the extant native writers.²

Considering the sources untrustworthy and following certain clues which he believed they afforded to a right understanding of the annalists, Niebuhr came to his theory as to the composition of the primitive Roman state. Although he asserts that it was made up of "patrons and clients,"³ he does not rest satisfied with this view, but proceeds to trace clientage to the following origins, as though in his opinion this institution did not exist from the beginning: (1) some native Sicilians perhaps, who were conquered by Latin invaders; (2) strangers settling on Roman territory and choosing a Roman as protector; (3) inhabitants of communities which were obliged to take refuge under Roman protection; (4) manumitted slaves.⁴ Logically he goes back to a state made up exclusively of patricians.

He sought evidence for this hypothesis in the scheme of tribal organization of Rome. The primitive city was divided into three tribes, thirty curiae and, as he believed, three hundred gentes. As no one could be a citizen without membership in a gens,⁵ and as the patricians alone were active members of the gentes,⁶ it must follow that the patricians alone were citi-

¹ Niebuhr treats Dionysius with great respect; cf. *Lectures*, i. liv: "The longer and more carefully the work is examined, the more must true criticism acknowledge that it is deserving of all respect, and the more it will be found a storehouse of most solid information." Schwegler, *Röm. Gesch.* i. 621 f., and 626 f., assumes that Dionysius is alone responsible for the view that the plebeians were in the primitive tribes and the curiae. A glance at the citations given above, p. 24 f., will show, however, that Cicero and Livy shared this view.

² Cf. Pais, *Storia di Roma*, I. 1. 82. The usual opinion (cf. Bernhöft, *Röm. Königsz.* 8 f.) is that the sources of Dionysius are later and less trustworthy than those of Livy, but Pais asserts that on the whole the two authors drew from the same sources.

³ *Lectures on Roman History*, i. 81, 100 f.

⁴ *Röm. Gesch.* i. 339, Eng. 165.

⁵ *Röm. Gesch.* i. 332, Eng. 158.

⁶ In *ibid.* i. 330, Eng. 162, he excludes the "freed clients" from the gens; in 339, Eng. 165, he states that the nobles alone *had* the gens, the clients belonged to it in dependent capacity.

zens. It is doubtful whether he would have proposed this hypothesis had it not been for the analogy of the Attic tribal scheme. An imperfect quotation from the lost part of Aristotle's *Constitution of Athens*¹ seems to signify that the Athenian state was once divided into four tribes (φυλαί), twelve phratries and three hundred and sixty gentes (γένη). On this authority Niebuhr supposes that the phratry was a group of gentes, and he assumes further that both phratries and gentes were composed exclusively of eupatrids.² But the suppositions (1) that there were three hundred and sixty gentes, (2) that the phratry was a group of gentes, (3) that both phratries and gentes contained only eupatrids are contradicted by well known facts. From the earliest times the Greek tribes and phratries included commons as well as nobles. This is true of the Homeric Greeks,³ and a law of Draco⁴ proves that the early Attic phratry comprised both nobles and commons. In historical times all citizens belonged to the phratries; whereas but few were members of the gentes.⁵ Most of the gentes were in fact composed of the old landed nobility, though a few, like the Chalkidae and the Eupyridae, were apparently industrial guilds, which had received the privileges of the gentes. So far therefore from supporting Niebuhr in his peculiar view of the Roman gentes and curiae, the Attic analogy militates in every way against him. As his assumption that the curia was a group of ten gentes has already been disproved,⁶ it remains only to consider whether the gens was an exclusively patrician institution. From the circumstance that patricianism is not given as an element of Scaevola's definition, quoted by Cicero,⁷ we may at once conclude that in their

¹ Cf. the edition of Sandys, 252; Rose, *Aristotelis Frag.* 385.

² *Röm. Gesch.* i. 326, Eng. 160. Genz, *Patricisches Rom*, 6, has the same idea.

³ *Il.* ii. 362 f.; ix. 63 f.

⁴ *CIA.* i. 61; cf. *Dem.* xliii. 57.

⁵ This is illustrated, for instance, by a law quoted by Philochorus, in Müller, *Frag. Hist. Graec.* i. 399. 94: Τοὺς δὲ φράτορας ἐπάναγκες δέχεσθαι καὶ τοὺς ὀργεῶνας καὶ τοὺς ὁμογάλακτας, οὓς γεννήτας καλοῦμεν ("The members of the phratry must receive the orgeones as well as the homogalaktes, whom we call gennetae"). This fact is now too well known to need further proof; cf. Gilbert, *Constitutional Antiquities of Sparta and Athens*, 148 f.; Thumser, *Griechische Staatsaltertümer*, 324 f.

⁶ P. II.

⁷ *Top.* 6. 29: "Gentiles sunt inter se, qui eodem nomine sunt. Non est satis. Qui ab ingenuis oriundi sunt. Ne id quidem satis est. Quorum maiorum nemo servitutem servivit. Abest etiam nunc. Qui capite non sunt deminuti. Hoc for-

time plebeians, too, were gentiles. This conclusion is supported by a variety of evidence.

Several plebeian gentes are mentioned, including the Minucia and the Octavia,¹ the Lutatia,² the Calpurnia,³ the Domitia,⁴ the Fonteia,⁵ the Aurelia,⁶ and the Licinia.⁷ Some gentes comprised both patrician and plebeian families, as the Cassia,⁸ the Claudia,⁹ the Cornelia,¹⁰ the Manlia,¹¹ the Papiria,¹² the Publilia or Poplilia,¹³ the Aebutia,¹⁴ and the Servilia.¹⁵ Not only do the sources refer to several plebeian gentes by name, but they clearly imply in other ways the existence of such associations. Livy¹⁶ expresses

tasse satis est. Nihil enim video Scaevolam pontificem ad hanc definitionem addidisse;" cf. Cincius, in Fest. ep. 94.

As the word itself indicates, gentiles are members of a gens, and no other members are known to the sources. If it were true, as Mommsen, *Röm. Staatsr.* iii. 66, supposes, that there were dependent members not termed gentiles, a name would have been given this dependent relation, or the jurists would have defined it, or some ancient writer would at least have mentioned it. The attempt of Kübler, *Wochenschr. f. kl. Philol.* xxv (1908). 541 f., to prove, on the authority of Cicero, *Tim.* II. 41, that clients were termed quasi gentiles is simply absurd. The passage does not even hint at clientage; and the quasi gentiles of the immortal gods, according to this passage, were related to the gods by birth, as the word *gignatis* proves. From this point of view men might be called the children of the gods; but because the divine element in both men and gods comes alike from the Creator, it is possible to place them more nearly on a level with one another — in a relation like that of gentiles. Kübler's other remarks on the gens, 539-43, are equally unconvincing.

¹ Cic. *Brut.* 16. 32; Livy iv. 16. 3; Suet. *Aug.* 2. Whether these two gentes had ever been patrician does not affect the question at issue.

² Val. Max. ix. 2. 1.

³ Cic. *Har. Resp.* 15. 32, mentions *sacrificia gentilicia* of the Calpurnia.

⁴ Suet. *Ner.* 1. ⁵ Cic. *Dom.* 13. 35. ⁶ Fest. ep. 23. ⁷ Varro, *R. R.* i. 2. 10.

⁸ Unless Sp. Cassius, consul 502, 493, 486 B.C. and author of the first agrarian rogation, is a myth; cf. Drumann-Gröbe, *Gesch. Roms*, ii. 94.

⁹ Cf. Cic. *Orat.* i. 39. 176. The patrician and plebeian branches are sometimes spoken of as distinct gentes; Suet. *Tib.* 1.

¹⁰ Mommsen, *Röm. Forsch.* i. 113 f.; Drumann-Gröbe, *ibid.* 359.

¹¹ Cic. *Phil.* i. 13. 32; Gell. ix. 2. 11; Fest. ep. 125. ¹² Mommsen, *ibid.* 116.

¹³ L. Popilius Volscus, patrician; Livy v. 12. 10. Q. Publilius Philo, plebeian; Livy viii. 15. 9.

¹⁴ This patrician gens included an Aebutius who was tribune of the plebs (Cic. *Leg. Agr.* ii. 8. 21) and several other plebeians; Klebs, in Pauly-Wissowa, *Real-Encycl.* i. 442 f.

¹⁵ Mommsen, *ibid.* 117 ff.

¹⁶ V. 14. 4: "Comitiis auspicato quae fierent indignum dis visum honores volgari discriminaque gentium confundi."

the patrician sentiment that "it would seem an affront to the gods for honors to be vulgarized and for the distinction between gentes to be confused at auspicated comitia" (by the election of plebeians to the consular tribunate). "The distinction between gentes" can only mean the distinction between patrician and plebeian gentes — an interpretation confirmed by a similar statement of Cicero¹ to Clodius, who had passed by arrogation from a patrician to a plebeian gens: "You have disturbed the sacra and contaminated the gentes, both the one you have deserted and the one you have defiled" (by your admission into it). To our other proofs we may add the consideration that the very expression *gentes patriciae*² implies the existence of plebeian gentes. It is natural then that Varro³ should make *gentilitas* a condition of men in general. In asserting that there were a thousand gentile names the same authority⁴ must have included those of plebeians, for scarcely a hundred belonging to patricians could have been known to him. By no means the weakest argument in favor of the view here presented is the fact that the laws of the Twelve Tables concerning inheritance, tutelage,⁵ etc. — which apply not to the patricians alone but to the whole citizen body — assume that every citizen in full possession of his civil rights belonged to a gens.

A passage often interpreted against the existence of plebeian gentes is Livy x. 8. 9: "*Vos solos gentem habere.*" In this case a plebeian speaker says the patricians claim that they alone have gens (not gentes). The context shows clearly, however, that gens does not here denote an association but is used in the sense of illustrious birth or pedigree,⁶ as is sometimes our word

¹ *Dom.* 13. 35: "*Ita perturbatis sacris, contaminatis gentibus, et quam deseruisti et quam poluisti.*"

² *Sall. Jug.* 95. 3; *Livy* iii. 27. 1; 33. 9; vi. 11. 2; *Gell.* x. 20. 5; cf. ix. 2. 11.

³ *L. L.* viii. 4: "*Ut in hominibus quaedam sunt agnationes ac gentilitates, sic in verbis.*"

⁴ In *Lib. Praen.* 3.

⁵ It will suffice to quote *Gaius* iii. 17: "*Si nullus agnatus sit, eadem lex XII Tabularum gentiles ad hereditatem vocat*"; cf. *Cic. Verr.* i. 45. 115: "*Lege hereditas ad gentem Minuciam veniebat.*" The Minucian gens was plebeian. Its right to the inheritance in question rested on this law of the Twelve Tables. For the gentile right of tutelage, see the so-called *Laudatio Turiae*, 15, 22 (*CIL.* vi. 1527; *Girard, Textes*, 778).

⁶ Cf. p. 20; see also *Auct. Inc. De Diff.* 527 (Keil): "*Gens seriem maiorum explicat.*"

family.¹ Wherever a nobility exists it necessarily lays greater stress on descent than do the people, and in all countries the nobles are in a far better position to keep up family connections than are the commons. Naturally therefore at Rome we hear more of patrician than of plebeian gentes. But in view of all the facts mentioned above there should be no doubt as to the existence of the latter. The result of this discussion is that neither in the composition of the gens nor in its position in the community can support be found for Niebuhr's assumption of a patrician state.²

Other evidence for his hypothesis Niebuhr thinks he finds in a statement of Labeo,³ that the curiate assembly was convoked by a lictor, the centuriate by a horn-blower; while Dionysius⁴ says that the patricians were summoned by name through a messenger, the people by the blowing of a horn. Thus Niebuhr maintains that Labeo and Dionysius agree unequivocally in designating the curiae as the assembly of the patricians. But in fact these two sources refer to the customs of the historical age, when the curiate assembly was ordinarily attended by only three augurs and thirty lictors. Horn-blowing under these circumstances would have been absurd. The summoning of the patricians by their own name and that of their father, on the other hand, proves them too few to compose a popular assembly. These citations therefore are far from supporting his hypothesis. His last and greatest proof is the identification of the *lex de imperio*, passed by the curiae, with the *patrum auctoritas*. If these are merely two terms for the same act, the curiae must have been made up of *patres*. But by establishing the fact that the *patrum auctoritas* belonged to the senate or to its patrician members, Willems⁵ and Mommsen⁶ have deprived Niebuhr's hypothesis of its main prop.

Niebuhr evidently believed that the curiae continued ex-

¹ E.g. "Family will take a person everywhere"; C. D. Warner, quoted by the *Standard Dictionary*, s. v.

² Mommsen's theory of the gens—a development from Niebuhr's—is criticized in *Pol. Sci. Quart.* xxii (1907). 668 f. The distinction between patrician gentes and plebeian stirpes, on which he especially relies, is there shown to be groundless.

³ Gell. xv. 27. 2.

⁴ II. 8. 4.

⁵ *Sén. Rom.* ii. 34 f.

⁶ *Röm. Forsch.* i. 233 f.; 247 f.; cf. Genz, *Patr. Rom.* 70. On the *patrum auctoritas*, see p. 235 below.

clusively patrician through the whole republican period.¹ This idea, however, must be dismissed for the following reasons: (1) Our sources agree that in the early republic the plebeians and clients continued to vote in the curiate assembly.² (2) The plebeians were in the curiae in 208 B.C., when the first curio maximus was chosen from the plebs.³ (3) In the time of Cicero thirty plebeian⁴ lictors represented the comitia curiata, and gave the votes.⁵ (4) Arrogations by plebeians took place in this assembly; in the well-known case of Clodius it must be borne in mind that it was a plebeian who arrogated him. (5) The extinction of the patriciate did not involve the downfall of the comitia curiata.⁶ (6) The confirmation by the curiae (lex de imperio) of elections in the centuriate assembly was conceived as a second vote of the community.⁷ (7) The resolutions of the comitia curiata are always thought of as resolutions of the populus, which Latin literature nowhere restricts to the patrician body. (8) In all ancient literature there is nowhere the slightest hint of a change in the social composition of the curiae or of the comitia curiata in the whole course of their history. What the ancients believed to be true of either institution at any particular period will hold therefore for its entire history.⁸

Of the arguments in favor of Niebuhr's hypothesis either added by Schweigler⁹ or brought by him into greater prominence, one only demands attention. He reasons that if the

¹ E.g. *Röm. Gesch.* ii. 359; iii. 168; Eng. ii. 147; iii. 73: "the common council of the patres — the curies."

² *Cic. Frag. A.* vii. 48; *Livy* ii. 56, especially § 3; *Dion. Hal.* vi. 89. 1; ix. 41.

³ *Livy* xxvii. 8. 3.

⁴ Mommsen, *Röm. Forsch.* i. 148.

⁵ *Cic. Leg. Agr.* ii. 12. 31.

⁶ *Cic. Dom.* 14. 38; *Livy* vi. 41. 10.

⁷ P. 185 below; cf. Mommsen, *Röm. Forsch.* i. 147 f.

⁸ In the face of all evidence to the contrary two or three scholars persist in maintaining essentially the opinion of Niebuhr that through the republic the curiae continued patrician. Herzog, *Röm. Staatsverf.* i. 98 f., 108, 1014, n. 2, imagines that from the beginning the clients belonged to the curia in its administrative capacity, shared in its sacra, attended its meetings, but did not vote. The plebs, however, were not even passive members. His reasons do not deserve mention. Vassis, *Ῥωμαίων Πολιτεία ἢ βασιλευμένη καὶ ἡλευθέρα* (Athens, 1903), also excludes the commons from the curiate assembly throughout its history. The fancies of Hoffmann, *Patr. und pleb. Curien*, need not detain us.

⁹ *Röm. Gesch.* i. 623 f.

plebs were in the curiate assembly, it would be impossible to explain the political advance made by the institution of the *comitia centuriata*; and the constitutional history of Rome would be reduced to an insoluble riddle. Here we have to deal with a subjective argument—the rejection of sources because they do not agree with a preconceived theory. Arguments of the kind, however, which may be easily invented for the support or overthrow of every imaginable proposition, carry little weight. Besides it is easy to show by analogies from the history of other peoples that the presence of the commons in the primitive assembly does not make the constitutional history of Rome a real enigma. In the primitive German assembly, for instance, were included all the warriors; and yet in the more developed German states were monarchies and aristocracies which gave the people little or no voice in the management of public affairs.¹ The Homeric Greek assembly included all freemen, who, however, had little to do with the government in that period, and still less under the aristocracy which followed.² In like manner, although the plebeians attended the *comitia curiata* and had a majority of votes in this assembly, they could not thereby control the government, for they absolutely lacked initiative.³ The *comitia centuriata*, a timocratic institution, elevated the rich and degraded the poor. Here as elsewhere the poor lost by the substitution of aristocracy for kingship; but a real constitutional advance was made in the gradations of privilege, which were based on wealth and which reached like a ladder from the humblest member of the proletarian century to the patrician knight in the *sex suffragia*.⁴ These gradations prepared the way for an ultimate equalization of rights. We conclude, then, that the presence of the commons in the primitive assembly is perfectly compatible with a rational view of constitutional development.

With Schwegler, who grants however reluctantly that the commons were received into the *curiae* before 208,⁵ the theory enters upon its present phase; for the great majority of writers since his time have accepted his view, yet with varying opinions as to the date of the change. Mommsen,⁶

¹ Cf. p. 152, 172.

² Cf. p. 170, 172.

³ P. 173 ff., 345.

⁴ P. 75, 96, 209.

⁵ *Röm. Gesch.* i. 625, n. 3.

⁶ *Röm. Forsch.* i. 140 f.

who more than any one else has made it clear that, so far back as our sources reach, the *populus* comprised both patricians and commons, nevertheless assumes that the latter were originally outside the *populus* but were admitted no later than the beginning of the republic.¹ In his reconstruction of the primitive state he supposes that the citizens were all *patres*, in so far as they, and they alone, could be fathers; or adjectively *patri-cii*, in so far as they, and they alone, had fathers.² Added to the citizens and their slaves was a class of persons termed *clients*, half way between freedom and slavery — a class made up from various origins but chiefly by the conquest of neighbors.³ These *clients* belonged, as dependents of the *gentes*, to the *curiae*, but had no vote in the assembly.⁴ Later the *plebs* were formed from the *clients* as the bond which united the latter with their patrons relaxed.⁵ The *plebs*, who were free citizens of inferior rank, came into being at the moment when the *patricio-plebeian comitia centuriata* acquired the right to express the will of the community.⁶

Although Mommsen knows well the weakness of the evidence offered by earlier writers, he adopts the hypothesis of an original patrician state, without attempting a systematic defence. Here and there in his works, however, he mentions some fact or condition which he would like to have considered proof. The following are the chief passages of this kind:

(1) The lack of right to the *auspicia*⁷ and to the *imperium*⁸ on the part of the *plebeians* proves that the *patriciate* was the original citizenship.

But we could as reasonably say, with reference to the *auspices*, that the two Attic *gentes* which furnished the sacred *exegetes* contained the only Athenian citizens.⁹ The *auspicia*, as Soltau¹⁰

¹ *Röm. Forsch.* i. 269; *Röm. Staatsr.* iii. 92. Clason, *Krit. Erört. über den röm. Staat*, 12, supposes they were admitted by the Ogulnian law, in 300. Genz, *Patr. Rom*, 41, 62, places their admission not earlier than the institution of the Servian tribes and not later than the decemvirate, greatly preferring the latter date.

² *Röm. Staatsr.* iii. 13; *Abriss*, 5.

³ *Röm. Staatsr.* iii. 54 f.

⁴ *Ibid.* iii. 91.

⁵ *Ibid.* iii. 63.

⁶ *Ibid.* iii. 67 f.

⁷ *Ibid.* i. 91, n. 1; cf. Lange, *Röm. Alt.* i. 261 f. Reference here is only to the *auspicia publica* of the magistrates. It is established below (p. 101 ff.) that from the beginning the *plebeians* had a right to private *auspices*.

⁸ *Röm. Staatsr.* iii. 77.

⁹ Cf. Töpffer, *Attische Genealogie*, 177.

¹⁰ *Altröm. Volksversaml.* 93.

has noticed, belonged to the *ius honorum*, as did also the *imperium*; hence they were both privileges of the nobility. In brief Mommsen's reasoning would make a governing nobility everywhere impossible.

(2) The cavalry were patrician; therefore the infantry must have been.¹

With the same kind of reasoning we could conclude that because in the Homeric age of Greece chariots were used in war by nobles only, the infantry must also have been exclusively noble; whereas we know that the rank and file were common men.² That the Roman army before Servius was similarly composed is supported not only by this and many other analogies, but also by the unanimous testimony of the sources. As in other primitive states the warriors belonged to the assembly and were the citizens.

(3) Of the sixteen local tribes named after *gentes* it can be proved that ten have the names of patrician *gentes*, and not one name is known to be plebeian. This is evident proof that from the beginning the patriciate was not nobility but citizenship.³

His premises prove no more than that at the time when these tribes were instituted the patricians were influential enough to give their names to ten, probably to all sixteen. In all the three cases mentioned, Mommsen reasons that because the patricians alone enjoyed the honors, privileges, and influence usually considered appropriate to a nobility, they must therefore have constituted not the nobility simply but the whole citizen body.

(4) He identifies *patres* with *gentiles* and assumes that the primitive state was an aggregate of *gentes*, thus making the *patres* the only members of the state.⁴

These are not proofs but unsupported assumptions. The only connection of *patres* with *gentes* given in Latin literature is in the well-known phrases *patres maiorum* and *minorum gentium*; and Cicero⁵ makes it clear that these *patres* were senators.

¹ *Röm. Staatsr.* iii. 109.

² *Röm. Forsch.* i. 106 f. and n. 80.

³ P. 69.

⁴ *Röm. Staatsr.* iii. 13.

⁵ *Rep.* ii. 20. 35: "Duplicavit illum pristinum patrum numerum et antiquos patres maiorum gentium appellavit, quos priores sententiam rogabat, a se adscitos minorum." The connection shows that Cicero is speaking of two classes of senators distinguished by the rank of the *gentes* from which they respectively came.

The phrase means senators from, or belonging to, the greater or lesser gentes. Furthermore it has been proved (1) that the patricians were not the only gentiles,¹ (2) that the curia, and hence the state, was not an aggregation of gentes.²

(5) We are informed, says Mommsen, (a) that the body of full Roman citizens consisted originally of a hundred families, whose fathers, the patres, regarded more or less concretely as the ancestors of the individual gentes, composed the senate, and together with them their descendants, the patricians, made up the citizen body; or expressed in other words (b) patrician originally meant just what was afterward included under the term ingenuus.³

For (a) Mommsen cites those passages by which it has been shown⁴ that the Romans looked upon the original hundred senators as the fathers neither of the "citizen body" nor of the "full citizens," but of the nobility. His statement of the case is directly contradicted by the authorities he quotes. As regards (b) it has been sufficiently proved⁵ that ingenuus when made equivalent to patricius most naturally signifies not "of free birth," but "of respectable, noble birth."

Most scholars have wisely avoided bringing the myth of the asylum⁶ into the argument. Pellegrino,⁷ however, identifies the refugees at that place with the entire plebeian body. As the asylum was not an Italian but a Greek institution,⁸ the story connected with it is doubtless a myth. It seems to have been invented by the Greeks of southern Italy, most probably in the fourth century B.C. At that time they began to view with alarm the southward advance of the Romans, and to disparage them accordingly by falsifications representing their origin as obscure and disreputable.⁹ Similar calumnies against other peoples were

¹ P. 28 f. ² P. 11 f. ³ *Röm. Staatsr.* iii. 14. ⁴ P. 17 f. and notes. ⁵ P. 20 f.

⁶ For the sources, see Schwegler, *Röm. Gesch.* i. 459 f.; Stengel, in Pauly-Wissowa, *Real-Encycl.* ii. 1885.

⁷ *Andeutungen über den urspr. Religionsunterschied der röm. Patr. und Pleb.* 1 f.

⁸ Cf. Livy xxxv. 51. 2; Serv. in *Aen.* ii. 761. Schwegler, *ibid.* 464-8, who insists on this fact, shows clearly that no historical value attaches to the myth; see also Pais, *Storia di Roma*, I. i. 218, n. 1.

⁹ Pais, *ibid.* 217 ff. Dionysius, i. 4. 2 f., expressly states that this story is a Greek falsification.

concocted by their Greek enemies.¹ Notwithstanding the fact that the story had not even a kernel of historical truth the Romans accepted it with more or less modification² and used it to some extent for partisan objects.³ They could not oppose the plebs to patricians as foreigners to natives, however, for (1) they supposed that plebeians as well as patricians participated in the original settlement of Rome, (2) they derived patrician as well as plebeian families from foreign sources.⁴ We are warranted in concluding that in adopting the Greek myth of the asylum they looked upon it as a cause of increase in the plebeian population without finding in it the origin of the plebeian class.

To the theory of an exclusively patrician *populus* the following objections may be summarily urged: (1) It is opposed by the unanimous testimony of the ancient authorities. (2) It rests upon a wrong explanation of the words *patres*, *patricii*, as designations of the nobles. (3) It is further propped up by reasons so feeble as to testify at once to its weakness, the more substantial basis having been overthrown partly by Mommsen himself. (4) The number of patricians is too small for the theory.⁵ (5) It ignores the meaning of the word *plebs*, which evidently signifies "the masses," in contrast with the few nobles, and hence could not apply to a class gradually formed by the liberation of clients, or by the admission of foreigners. No one who holds the theory has attempted to show what these liberated clients were called when they were but few compared with the patricians — before they became "the multitude." (6) It is contradicted by everything we know of Rome's attitude

¹ See the examples collected by Pais, *ibid.*

² Cf. Livy i. 8. 5.

³ Cf. *ibid.* ii. 1. 4.

⁴ Dionysius, i. 85. 3, states that the colonists from Alba were mostly plebeians, but that a considerable number of the highest nobility accompanied them. It is a significant fact, however, that no patrician family is known to have derived its origin from this earliest colony. Those who claimed Alban and Trojan descent preferred to connect their admission to citizenship with the Roman annexation of Alba Longa, e.g. the Tullii, Servilii, Quinctii, Geganii, Curiatii, and Cloelii; Livy i. 30. 2. On the Alban and Sabine origin of most of the nobility, Livy iv. 4. 7. In so far as the local cognomina are indicative of origin (cf. Willems, *Sén. Rom.* i. 11 ff.), they point to a diversity of foreign connections. The Tarquinian gens, which in later time was thought of as patrician, came from Etruria, ultimately from Greece. The Aemilii were Greek (Plut. *Aem.* 1; Fest. ep. 23) or Sabine (Plut. *Num.* 8) or Oscan (Fest. 130. 1).

⁵ Cf. p. 31 above. For details, see *Pol. Sci. Quart.* xxii. 679 ff.

towards aliens. So far back as our knowledge reaches, she was extremely liberal in bestowing the citizenship, even forcing it upon some communities. Only when she acquired the rule over a considerable part of Italy did she begin to show illiberality in this respect. Down to 353 the citizenship thus freely extended included the right to vote.¹ (7) It assumes the existence of a community politically far advanced yet showing no inequalities of rank among the freemen — a condition outside the range of human experience. It aims to explain the origin of the social classes on purely Roman ground, ignoring the fact that distinctions of rank are far older than the city, and exist, at least in germ, in the most primitive communities of which we have knowledge.²

III. *The Comparative-Sociological View*

As social classes belong to all society,³ they cannot be explained by the peculiar conditions of any one community. The

¹ That Caere was the first community to receive the *civitas sine suffragio* may justly be inferred from the expression "Caerite franchise," which designates this kind of limited citizenship (cf. p. 62). The general fact stated in (6) is further confirmed by the law which granted the right of extending the pomerium to those magistrates only who had acquired new territory for Rome; Gell. xiii. 14. 3; Tacitus, *Ann.* xii. 23.

² Since the publication of the *Staatsrecht*, writers have made slight modifications or extensions of the conventional theory. Greenidge, in Poste, *Gaii Institutiones*, xix, suggests that the dual forms in Roman law may have as their basis a racial distinction between the patricians and the plebeians. A serious objection to this kind of reasoning is that if we are on the lookout for dualities, trinities, and the like, we shall find them in abundance everywhere. All sorts of theories as to the racial connections of the two social classes have been proposed. Zöllner, *Latium und Rom*, 23 ff., supposes that the patricians were Sabine and the plebeians Latin. Ridgeway, *Early Age of Greece*, i. 257, holds that the plebeians were Ligurians, whereas Conway, in *Riv. di Stor. ant.* vii (1903). 422-4, prefers to consider them Volscians. These notions are equally worthless. Undoubtedly race is a potent factor in history; but Gumpłowicz, *Rassenkampf* (1883), has killed the theory by overwork.

Among the writers who have rejected the conventional view are Soltau, *Altröm. Volksversamml.* (1880); Bernhöft, *Röm. Königsz.* (1882); Pelham, *Outlines of Roman History* (1893; reprint of his article on "Roman History," in the *Encycl. Brit.*); Meyer, *Gesch. d. Alt.* ii (1893); Holzapfel, in *Beitr. z. alt. Gesch.* i (1902). 254.

³ Meyer, *Gesch. d. Alt.* ii. 80; Featherman, *Social History of the Races of Mankind*, ii. 408; Hellwald, *Culturgeschichte*, i. 175; Barth, *Philosophie der Geschichte*, i. 382. It would be practicable by the citation of authorities to prove the existence of such distinctions in nearly every community, present or past, whose social condition is sufficiently known.

only scientific approach to this subject is through comparative study; the inferences of the ancient historians relative to primitive Rome are not to be displaced by purely subjective theories, but are to be tested by comparison with conditions in other communities of equal or less cultural advancement.

Distinctions of rank depend ultimately upon physical, mental, and moral inequalities,¹ which differentiate the population of a community into leaders and followers.² The exhibition of physical strength and skill on the part of young men and of knowledge and wisdom on the part of the elders are often "the foundation of leadership and of that useful subordination in mutual aid which depends on voluntary deference."³ In an age in which men were largely under the control of religion the possession of an oracle or skill in divination or prophecy might contribute as much to the elevation of an individual above his fellows.⁴ Leadership, once obtained, could display and strengthen itself in various ways. In primitive society the strong, brave, intelligent man was especially qualified to take command in war. Success brought the chief not only renown but a large share of the booty and in later time acquired land. The same result might be obtained by other means than by war;⁵ but in any case wealth and influence inherited through

¹ Giddings, *Principles of Sociology*, 124; Tarde, *Laws of Imitation*, 233 f.; Fairbanks, *Introduction to Sociology*, 158; Grave, *L'individu et la société*, 23; Funck-Brentano, *Civilisation et ses lois*, 71 f.; Caspari, *Urgeschichte der Menschheit*, i. 125 f.; Hellwald, *ibid.* i. 175, 177; Ross, *Social Control*, 80.

² Giddings, *ibid.* 262; Ammon, *Gesellschaftsordnung*, 133 f.; Cherbuliez, *Simple notions de l'ordre social à l'usage de tout le monde*, 38 f.; Dechesne, *Conception du droit*, 36; Grave, *ibid.* 23 f.; Caspari, *ibid.* i. 133 f.; Harris, *Civilization considered as a Science*, 211; Lepelletier de la Sarthe, *Système sociale*, i. 329; Mismar, *Principes sociologiques*, 63 f.; Rossbach, *Geschichte der Gesellschaft*, i. 13 f.; Schurtz, *Urgeschichte der Kultur*, 385; Hittell, *Mankind in Ancient Times*, i. 228 f.; Maine, *Early History of Institutions*, 130; Seebohm, *Tribal System in Wales*, 139; Post, A. H., *Anfänge des Staats- und Rechtslebens*, 150 f.

³ Giddings, *ibid.* 262; cf. Arnd, *Die materiellen Grundlagen . . . der europäischen Kultur*, 444 f.; Frohschammer, *Organisation und Kultur der mensch. Gesellschaft*, 84 f.; Bastian, *Rechtsverhältnisse bei verschiedenen Völkern der Erde*, 20 f.; Spencer, *Principles of Sociology*, ii. 333, 335.

⁴ Frazer, *Early Hist. of the Kingship*; Spencer, *ibid.* ii. 338 f.; cf. for the Malays, Skeat and Blagden, *Pagan Races of the Malay Peninsula*, 499.

⁵ Cf. Rubino, *Röm. Verf.* 183; Spencer, *ibid.* ii. 334 f.; Seebohm, *Tribal System in Wales*, 72.

several generations made nobility.¹ Primarily grounded on ability, wealth, and renown, this preëminence was often heightened by a claim to divine lineage or other close connection with the gods.²

There was evidently a stage of development—before the association of the nobles into a class—in which chieftains alone held preëminence. This condition is common in primitive society, as among the American Indians.³ Also among the Germans, who had advanced somewhat beyond this stage, each chief or lord appears to have been noble “less with reference to other noblemen than with reference to the other free tribesmen comprised in the same group with himself.”⁴ From Brehon law we infer that the Irish lords were individually heads of their several groups of kinsmen or of vassals;⁵ and in Wales the nobles were a hierarchy of chieftains.⁶ As soon as leadership became hereditary there arose noble families, in which the younger members were often sub-chieftains;⁷ and finally through intermarriage among these families, as well as through the discovery of common interests, the nobles associated themselves into a class.

Among the ancient Germans,⁸ the Greeks of the Homeric

¹ Aristotle, *Politics*, 1294, a 21; Giddings, *Principles of Sociology*, 293 f.; Jenks, *History of Politics*, 30 f.; Grave, *L'individu et la société*, 25; Combes de Lestrade, *Éléments de sociologie*, 185; Schurtz, *Urgeschichte der Kultur*, 148, 385; Featherman, *Social History of the Races of Mankind*, see index, s. Classes; Hittell, *Mankind in Ancient Times*, i. 228; Maine, *Early History of Institutions*, 134; Ginnell, *Brehon Laws*, 60 f.; Farrand, *Basis of American History*, 114, 201; Bluntschli, *Theory of the State*, 149.

² Grave, *ibid.* 30 f.; Combes de Lestrade, *ibid.* 184 f.; Funck-Brentano, *Civilisation et ses lois*, 68 f.; Spencer, *ibid.* ii. 348 f.; Schurtz, *ibid.* 150 f.; Featherman, *ibid.* ii. 128, 197 f., 311; Letourneau, *Sociology*, 480 f.; Bastian, *Rechtsverhältnisse*, 8 f.

³ Cf. Schurtz, *ibid.* 148; Farrand, *ibid.* 114, 129, 141. For the Malays, see Skeat and Blagden, *ibid.* 494 ff.

⁴ Maine, *ibid.* 132.

⁵ Maine, *ibid.*; Ginnell, *Brehon Laws*, 63 f., 93 f.

⁶ Seebohm, *Tribal System in Wales*, 134 f.

⁷ As in Wales; Seebohm, *ibid.* 139; cf. the Inca grandees, who all claimed descent from the founder of the monarchy; Letourneau, *Sociology*, 479.

⁸ Tac. *Germ.* 13. 3: “Insignis nobilitas aut magna patrum merita principis dignationem etiam adulescentulis adsignant.” It is clear that the family of a youth who receives an office or dignity because of the merits of his ancestors is coming near to nobility.

age,¹ and in some early Italian states² certain families had become noble, and others were on the way to nobility. For ancient Ireland the entire process can be followed. A common freeman enters the service of some chief, from whom he receives permission to use large portions of the tribe land.³ By pasturing cattle, he grows wealthy, becomes a bo-aire (cow-nobleman) and secures a band of dependents. Supported by these followers, he preys upon his neighbors and, if successful, becomes in time a powerful noble.⁴ After "a certain number of generations" he can no longer be distinguished from the blooded nobility.⁵ Here is an instance of a common freeman's becoming noble through service to a chief. In like manner among the Saxons who had conquered England the *eorl* who "thrived so that he had fully five hides of land," or the merchant who had "fared twice over the wide sea by his own means," became a thane; "and if the thane thrived, so that he became an *eorl*, then was he henceforth worthy of *eorl*-right."⁶ "The thanes were the immediate companions of the king — his *comitatus* — and from their first appearance in English history they took rank above the earlier nobility of Saxon *eorls*, who were descended from ancient tribal chiefs. Thus the thanes as a nobility of newly rich corresponded to the cow-noblemen of an earlier time."⁷ In the way just described many rose from the lower ranks to nobility. In fact, eminent authorities assert that the inferior

¹ A certain man of illegitimate birth, hence of inferior social standing, through martial skill and daring becomes a leader of warriors, acquires wealth, marries the daughter of a notable, "waxes dread and honorable" among his countrymen, who elect him to a high military command by the side of their hereditary chief; the taint of his birth is forgotten; *Od.*, xiv. 199; cf. Bernhöft, *Röm. Königsz.* 123.

² Livy viii. 39. 12; x. 38. 7: "Nobilissimum quemque genere factisque," with reference to the Samnites; some were nobles by birth, others by prowess; cf. 46. 4: "Nobiles aliquot captivi clari suis patrumque factis ducti;" some of these captives were noble through their own prowess, others through that of their ancestors. The Samnite nobility was in the formative stage like that of the German nobility in the time of Tacitus. The Yakonan of California are in this condition; Farrand, *Basis of American History*, 129.

³ Maine, *Early Hist. of Inst.* 135 f.; Giddings, *Principles of Sociology*, 294 f.

⁴ Cf. Giddings, *ibid.*

⁵ Maine, *ibid.* 136.

⁶ Laws of Athelstan.

⁷ Giddings, *Principles of Sociology*, 296; cf. Maine, *Early Hist. of Inst.* 141. Thus in the time of Tacitus the German youth of common blood who entered the *comitatus* of a chief had a fair opportunity to become noble; *Germ.* 13. 3-5; 14. 1 f. Among the Danes, too, some noble families were once peasant; Maine, *ibid.* 135.

nobles, especially of the middle age, were more often of servile than of free origin, as the common freemen were inclined to think it degrading to be seen among the comites of a chief.¹

It has now been sufficiently established that even in the tribal condition people were differentiated into social ranks. We have traced the beginning of nobility to leadership and have found, in both ancient and mediaeval society, new noble families forming by the side of the old. Social distinctions were well developed long before the founding of cities. When a community, whether a tribe or a city, is far enough advanced to begin the conquest of neighbors, "it has already differentiated into royal, noble, free, and servile families."² This was true of Sparta. In her "the conquerors nevertheless, notwithstanding great differences among themselves, remain sharply separated in social function from the conquered . . . The conquerors became a religious, military, and political class, and the conquered an industrial class."³ Even in the case of Sparta, however, which is perhaps our best example of the exclusiveness of a ruling city, there is evidence of mingling between the conquering Spartans and the conquered Laconians before the former became exclusive.⁴ In like manner there was much mixing of the invading "Aryans" with the natives of India—the more intelligent of the natives rising to the higher classes and the less gifted of the invaders sinking to the lower—before the crystallization of the castes.⁵ We find the same mingling of conquerors and conquered in varying degrees in ancient Ireland,⁶ in England under the Normans,⁷ and throughout the Roman empire in the

¹ Brunner, *Deutsche Rechtsgeschichte*, i. 235 f., 252; Maine, *ibid.* 138; Ammon, *Gesellschaftsordnung*, 135; Schurtz, *Urgeschichte der Kultur*, 148 f.; Bluntschli, *Theory of the State*, 131, 155; Tarde, *Laws of Imitation*, 237.

² Giddings, *Principles of Sociology*, 315; cf. Combes de Lestrade, *Éléments de sociologie*, 185; Rossbach, *Gesch. der Gesellsch.* i. 14. A nobility formed purely by conquest, if such indeed exists, must be rare, and can hardly be lasting; Schurtz, *Urgesch. der Kul.* 149.

³ Giddings, *ibid.* 315; cf. Grave, *L'individu et la société*, 32.

⁴ Strabo viii. 4. 4, p. 364; Aristotle, *Politics*, 1270, a 34.

⁵ Schurtz, *Urgesch. der Kult.* 165.

⁶ Ginnell, *Brehon Laws*, 145.

⁷ Bluntschli, *Theory of the State*, 142; Freeman, *Norman Conquest*, iv. 11. There were nobles both in England and in Normandy before the conquest. After the battle of Senlac most of the English nobles submitted to William, and were allowed to

period of Germanic settlements.¹ It becomes doubtful, therefore, whether a nobility was ever formed purely by the superposition of one community upon another. The effect of conquest was rather to accentuate existing class distinctions, and by a partial substitution of strangers in place of native nobles to stir up antagonism between the classes. Even where the differences between the social ranks seem to be racial, it would be hazardous to resort to the race theory in explanation; for such a condition could be produced in the course of generations by different modes of life, education, nurture, and marriage regulations of the nobles and commons respectively.²

The study pursued thus far will enable us to understand how there came to be social classes at Rome before the beginning of conquest. But for a long time after the Romans began to annex territory we may seek in vain for a distinction between conquerors and conquered, like that which we find in Laconia. We are forbidden to identify the plebs with the conquered and the patricians with the conquerors by many considerations mentioned above—for instance, by tradition,³ by the derivation of several patrician gentes from various foreign states,⁴ by the fewness of the patricians,⁵ and by the fact that the latter show no differentiations of rank, such as we find among the conquering Spartans; they were not a folk but a nobility pure and simple. We are to regard Rome's early annexations of territory and of populations not as subjugations, but as incorporations on terms of equality. The people incorporated were of the same great folk, the Latins, or of a closely related folk, the Sabines. Accordingly they were not reduced to subjection, but were

redeem their lands; Freeman, *ibid.* iv. 13 f., 36 f. It was only in punishment for later rebellion that they lost their holdings, and some English thanes were never displaced; cf. Powell, in Traill, *Social England*, i. 240.

¹ The most violent and oppressive Germanic invaders are supposed to have been the Vandals, and yet they doubtless retained for the administration of the government the trained Roman officials; Hodgkin, *Italy and her Invaders*, ii. 263. The Ostrogoths were more liberal in their treatment of the Romans (*ibid.* iv. 250, 271, 282), and the Franks still more liberal; Brunner, *Deutsche Rechtsgesch.* ii. 202.

² Featherman, *Social History of the Races of Mankind*, ii. 354; Tarde, *Laws of Imitation*, 238, n. 1, 239; Hellwald, *Kulturgesch.* i. 175 f.; Schurtz, *Urgesch. der Kult.* 149; cf. Demolins, *Comment la route crée le type social*.

³ P. 16.

⁴ P. 37, n. 4.

⁵ P. 31; *Pol. Sci. Quart.* xxii (1907). 679 ff.

admitted to citizenship, to the tribes and the curiae, and their nobles were granted the patriciate.¹ Only communities of alien speech, like the Etruscan, or distant Italian communities like the Campanian, were ordinarily given the inferior *civitas sine suffragio*; and this restricted citizenship does not appear in history before the middle of the fourth century B.C.

The analogies offered in this chapter, by proving that the conditions they illustrate are possible for early Rome, tend to confirm the authority of the sources. By similar comparative study it would be practicable to illustrate in detail and to corroborate the statements of ancient writers as to the organization of the plebs, as well as of the patricians, in tribes and curiae, the participation of the clients and plebeians in war and politics, and the deterioration of the free commons through the strengthening of the nobility—all of which are rejected by eminent modern historians, who merely imagine them incompatible with primitive conditions or with a rational theory of constitutional development. The inquiry has been pursued far enough, however, to indicate that from a comparative-sociological point of view the conception

¹ The idea that the primitive community is essentially illiberal with its membership is erroneous. For the mingling of conquerors and conquered, see p. 42 f. and notes. On the ethnic heterogeneity of states in general, see Gumpłowicz, *Rassenkampf*, 181. The laws of Solon granted citizenship to alien residents who were in perpetual exile from their own country, or who had settled with their families in Attica with a view to plying their trade; Plut. *Sol.* 24. Under his laws, too, a valid marriage could be contracted between an Athenian and an alien; Hdt. vi. 130. The Athenians, like the Romans, believed that many of their noble families were of foreign origin. In Ireland "strangers settling in the district, conducting themselves well, and intermarrying with the clan, were after a few generations indistinguishable from it;" Ginnell, *Brehon Laws*, 103. Nearly the same rule holds for South Wales; Seebohm, *Tribal System in Wales*, 131. To the Germans before their settlement within the empire the idea of an exclusive community must have been foreign; for as yet the individual was but loosely attached to his tribe. Persons of many tribes were united in the *comitatus* of a chief; the two halves of a tribe often fought on opposite sides in war; a tribe often chose its chief from another tribe. Intermarriage among the tribes was common, even between Germans and Sarmatians. A single tribe often split into several independent tribes, and conversely new tribes were formed of the most diverse elements; Seeck, *Geschichte des Untergangs der antiken Welt*, i. 209 with notes; Kaufmann, *Die Germanen der Urzeit*, 136 f. Under these circumstances the primitive German community cannot be described as exclusive. In like manner our sources unanimously testify to the liberality of early Rome in granting the citizenship to strangers. It is no longer possible to oppose to this authority the objection that such generosity does not accord with primitive conditions.

of early Rome handed down to us by the ancients is sound and consistent, and that the method of subjective reconstruction of history introduced by Niebuhr and still extensively employed by scholars is unscientific.

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CHAPTER III

THE THIRTY-FIVE TRIBES

THAT among the Romans the conception of property first attached to movable objects is attested by the words "pecunia" and "mancipatio."¹ There was probably a period during which the citizens cultivated the lots of arable land assigned them by the state without regarding these holdings as property either public or private. In view of the well-established fact that the gens was a relatively late institution, we should for this remote period exclude the idea of gentile tenure.² The land was distributed among the families according to tribes and curiae; and when the idea of ownership extended to the soil, it took the form of family ownership of the ager privatus and state ownership of the public domain.³

The condition of tenure anterior to the conception of property in land left little trace of itself in the language and institutions and absolutely none in tradition. The sources declare that family

¹ Gaius i. 120 f.

² Mommsen's theory of gentile ownership, adopted by Kubitschek, in Pauly-Wissowa, *Real-Encycl.* i. 790, depends upon his view that the gens was as old as the state; in his opinion it was originally stronger but gradually weakened, whereas the state went through the opposite process; *Röm Staatsr.* iii. 25. But if, as I have elsewhere pointed out (*Pol. Sci. Quart.* xxii. 685 ff.), the gens developed from the family during the decline of the kingship and the rise of aristocracy, the theory of a primitive gentile ownership falls to the ground.

³ We are not to think of the state as granting a certain district to the tribe, which then parcelled it among the component curiae, etc., for this reason that the tribes and the curiae did not themselves possess common lands. Rather the state divided a given district among the families which were already included, or which it wished to include, in a given curia or tribe. In this way the later tribes were formed in historical time, and in this way the Claudian tribe was originally constituted; Livy ii. 16. 4 f.; cf. Plut. *Popl.* 21. When therefore Dionysius, ii. 7. 4, states that Romulus divided the land into thirty lots and assigned a lot to each of the thirty curiae, he means, if he correctly understands the matter, that land was assigned not to the curia as a whole but to the families which composed the curia, unless indeed the curiae once had a right of landholding not possessed in historical time.

ownership existed in Rome from her foundation as well as in her earliest colonies—a view confirmed by the comparative study of language.¹ Each family, they assume, held two iugera—the heredium²—or we may more correctly say, at least two iugera.³ This small lot has generally been explained⁴ as the private landed property of the individual, in contrast with the public land and with the common land of the gens, and thus it is taken as evidence of a condition prior to the extension of private ownership to the arable fields. Should we grant this to be the true explanation, we might still assume that public and gentile tenure had developed into private ownership of arable land long before Servius, or that Servius himself converted the fields into private holdings. For the second alternative we could find apparent support in the sources, which have much to say of the distribution of land among the citizens by Servius.⁵ For the continued absence of private ownership after the Servian reforms not even the shadow of an authority can be found.

But the explanation of heredium given above is by no means necessary; in fact the sources regard it not as the only private land, but rather as the smallest share allotted to any citizen, the rich and noble possessing more.⁶ While accordingly the wealthy man owned many iugera, the poor man, limited to his heredium, was obliged to earn part of his living by labor as a tenant or as a wage-earner in the field of his rich neighbor;⁷ and in the early colonies the bina iugera were granted on the same aristocratic principle. If this is the true explanation of heredium, the

¹ Christ, W., in *Sitzb. d. Berl. Akad. d. Wiss.* 1906. 207.

² In the Twelve Tables heredium has the meaning of hortus, "garden;" Pliny, *N. H.* xix. 4. 50. It was a praedium parvulum consisting of two iugera; Fest. ep. 99.

³ In the earliest colonies this was the amount assigned to each man; cf. Livy iv. 47. 6 (Labici); vi. 16. 6 (Satricum); viii. 21. 11 (Tarracina, founded 329). The first two are not so distinctly historical as the third; Mommsen, *Röm. Staatsr.* iii. 24, n. 1. Supposing Rome to have been a colony, the historians infer that Romulus made a similar distribution among its earliest settlers; cf. Varro, *R. R.* i. 10. 2; Pliny, *N. H.* xviii. 2. 7; Fest. ep. 53; Juvenal xiv. 163 f.; Siculus Flaccus 153; Livy vi. 36. 11; Plut. *Popl.* 21; Columella v. 1. 9; Nissen, *Ital. Landesk.* ii. 507.

⁴ Cf. Mommsen, *Röm. Staatsr.* iii. 23 f.

⁵ Dion. Hal. iv. 13. 1; Varro, *De vit. pop. rom.* i, in Non. Marc. 43; Livy i. 46. 1.

⁶ Dion. Hal. v. 57. 3; Plut. *Popl.* 21. Moreover the division into the five classes was based on unequal holdings.

⁷ Cf. Meyer, *Gesch. d. Alt.* ii. 518, n.

strongest argument in support of the theory of public ownership at Rome in the late regal period is taken away; we must either abandon the theory or relegate it to a time far anterior to the Servian reforms. Mommsen's assumption¹ that the sixteen oldest rural tribes were instituted some time after the city tribes by the division of gentile lands is untenable on other grounds. The gens which gave its name to the tribe could not have owned all the land in the tribe; for in that case all but the sixteen gentes would have been landless. Again, assuming, as he does, that all the land belonged to the gentes, which he supposes to have been exclusively patrician, we should be forced to conclude that the division left the plebeians landless. And further, if we bear in mind that the gens developed from the family, we must also believe that the undivided gentile land was once a family estate, which according to Roman usage had to be registered in some tribe, even if the land of the gens was not so registered. Mommsen's theory proves therefore not only to be unsupported by the sources but actually unthinkable. In conclusion we may safely say that though some land remained public, and though the gens after it had come into existence owned some common land, individual, or at most family,² ownership was in full force in the earliest times of which we have knowledge.

The clearest and most detailed account of the origin of the Servian tribes is given by Dionysius iv. 14. 1 f.: "When Tullius had surrounded the seven hills with one wall, he divided the city into four parts, and giving to the parts the names of the hills—to one Palatina, to another Suburana, to the third Collina, and to the fourth Esquilina—he made the city to consist of four tribes, whereas up to that time it had comprised but three. . . . And he ordained that the men who lived in each of the four parts should not change their abode or give in their census elsewhere. The enlistment of soldiers also and the collection of taxes, which they were to pay individually to the treasury for military and other purposes, were distributed no longer among the three gentile tribes but among the four local tribes instituted by him. . . . [15. 1:] And the whole country

¹ *Röm. Staatsr.* iii. 168.

² Dion. Hal. iv. 14. 2 might refer to a condition in which land was still *inalienabile* and the right of changing residence restricted.

he divided, as Fabius says,¹ into twenty-six parts, also called tribes, adding to them the four city tribes; but Venonius is authority for thirty-one rural tribes, which with those of the city would complete the thirty-five of our own time. Cato, however, who is more trustworthy than either of these two, says that all the tribes in the time of Tullius amounted to thirty, though he does not separate the number of parts " (into urban and rural).

A great variety of opinion has arisen regarding the original number of the Servian tribes. Niebuhr² believed that Servius created in all thirty, afterward reduced by unfortunate war with the Etruscans to twenty. This view found supporters but was refuted by Huschke.³ Those who rejected it generally agreed that Servius divided the city into four tribes and the country into districts, regiones, pagi.⁴ Mommsen⁵ gave a new phase to the theory of the subject by assuming that the four so-called city tribes, which all the sources agree in ascribing to Servius,⁶ included the country as well as the city. According to this hypothesis Alba⁷ and Ostia,⁸ for instance, belonged to the Palatine tribe. His opinion has found wide acceptance.⁹

¹ The text followed is that of Jacoby. The reading represented by Jordan, *Cato*, p. 8, is not satisfactory. We have no ground for impugning the statement of Dionysius that Fabius actually called the country districts phylae, tribes. He may have termed them at once *μοῖραι*, "regions," and phylae with perfect consistency; cf. Kubitschek, *Röm. trib. or.* 7, n. 34.

² *Röm. Gesch.* i. 434-7; English, 205 f.

³ *Verf. d. Serv.* 95 f.

⁴ Cf. Huschke, *Verf. d. Serv.* 72 ff., who supposed that the twenty-six rural regiones were in most respects like tribes, but contained only plebeians, who were politically inferior to the city people; see also Schwegler, *Röm. Gesch.* i. 736 f.

⁵ *Röm. Tribus*, followed by Grotefend, *Imp. rom. trib. descr.*

⁶ The supposition that there were originally but four rests upon those passages which mention only that number in connection with Servius, as Livy I. 43. 13; Fest. ep. 368; (Aurel. Vict.) *Vir. Ill.* 7. 7; the discussion of the four city tribes as though they were the only Servian tribes by Dionysius (iv. 14. 1), whereas in the next chapter he describes those also of the country; and the designation of the rural districts as regiones rather than tribes by Varro, *De vit. pop. rom.* i, in Non. Marc. 43: "Et extra urbem in regiones xxvi agros viritim liberis attribuit." In *L. L.* v. 56, however, he calls the country districts tribes.

⁷ Grotefend, *ibid.* 27.

⁸ Inferred from an obscure passage in Fest. 213. 13, and from inscriptions cited by Mommsen, *Röm. Trib.* 215; Grotefend, *ibid.* 67.

⁹ Lange, *Röm. Alt.* i. 504; Herzog, *Röm. Staatsverf.* i. 39 and n. 2; Pelham, *Röm. Hist.* 39; Soltau, *Altröm. Volksversamml.* 457 ff.; Greenidge, *Röm. Pub. Life*, 67.

Afterward changing his mind, he asserted that the four urban tribes were confined within the pomerium—a view which now seems to be established beyond doubt.¹ With this final position of Mommsen the creation of theories as to the number and limitations of the Servian tribes has not been exhausted; for against the view that Servius instituted only the four urban tribes may be placed that of Pais,² who assigns their origin to the censors of the year 304. The theory of Pais implies that the sixteen rural tribes which bore gentile names were far older than the four urban tribes.

Light will be thrown on this obscure subject by an inquiry into the relation of the sources to one another. It seems certain that Fabius derived his information concerning the tribes and the entire centuriate organization from the "discriptio centuriarum"—a document in the censors' office. Though ascribed to Servius Tullius as author,³ it set forth the centuriate system as it existed in reality before the reform—that is in the time of the first war with Carthage.⁴ It was this late form of the centuriate organization which Fabius had in mind. He must have been prevented, however, from ascribing to Servius the institution of all the thirty-three tribes then existing, by the recollection that two tribes were added as recently as 299 from territory too far from Rome to have formed a part of her domain under Servius; and perhaps the curiate organization led him to favor the number thirty. He made Servius the author of thirty tribes, accordingly, in spite of the fact that this number was not reached till 318. His error is not more absurd

¹ *Röm. Staatsr.* iii. 163 ff. Mommsen calls attention to epigraphic evidence, cited more fully by Kubitschek, *Imp. rom. trib. descr.* 26 f., which assigns Ostia unmistakably to the Voturia tribus. He notices further that the same sort of evidence which places Ostia in the Palatina would give Puteoli, Sutrium, Canusium, and Fundi to the same city tribe, which is impossible. The error of including Alba and Ostia in the Palatina is due to neglect of the fact that men excluded from the country tribes were assigned to those of the city irrespective of domicile; cf. *Röm. Staatsr.* iii. 442 f., with notes.

² *Stor. di Rom.* I. i. 320, n. 1, relying on Livy ix. 46. 14.

³ *Fest.* 246. 30: "'Pro censu classis iuniorum' Ser. Tullius cum dixerit in descriptione centuriarum;" cf. 249. 1; Livy I. 60. 4; iv. 4. 2. Cicero, *Rep.* ii. 22. 39, writes discriptio, which Lange, *Röm. All.* i. 464, following Bücheler, in *Rhein. Mus.* xiii (1858). 598, accepts as the correct form.

⁴ P. 67.

than the ascription to Servius of the whole centuriate organization as it stood at the opening of the First Punic War, or the assumption that in the first Servian census were enrolled eighty thousand men fit for military service.¹ Cato, who also states the original number as thirty, without separating them into rural and urban,² may have been influenced by Fabius, though it is likely that he drew from the same source. Venno-
nius in making Servius the author of all thirty-five tribes but slightly exceeds the absurdity of earlier writers.³ Evidently Fabius and Cato were the sources for all future annalists. While depending on them, Varro seems to have noticed the error of ascribing twenty-six rural tribes to Servius, as there were but seventeen of this class before 387. To avoid the difficulty and at the same time to retain the Fabian number, he supposed that the country districts of Servius were not yet tribes but the *regiones* from which the tribes were afterward formed⁴—a superficial explanation in the true Varronian style.⁵ Following Varro, however, later authorities generally speak of the four urban tribes of Servius without mentioning those of the country.⁶ So Dionysius, after referring to the four city tribes, proceeds to describe their character and functions, as though these were all the tribes then existing.⁷ Thus far he depends upon Varro. Fortunately, however, he gained from Fabius the information that there were also twenty-six rural tribes, his description of which⁸ is slightly troubled by the

¹ Fabius Pictor, in Livy i. 44. 2. Altogether unnecessary therefore is Soltau's supposition (*Altröm. Volksversamml.* 458, n. 2), in itself improbable, that Fabius, who wrote his annals in Greek, applied the word *φυλαί* incorrectly to the rural districts. However that may be, Cato, as good an authority, spoke of these same districts as tribes. If the number thirty was suggested to Fabius by the curiate organization (cf. Ullrich, *Centuriatcomitien*, 9), this circumstance would be no argument against the existence of country tribes. On the strength of the army in the early republic, see p. 83.

² P. 57.

³ Ibid.; cf. Pais, *Leg. of Rom. Hist.* 140.

⁴ Just as he supposed the Suburana to have been evolved, name and all, from the pagus Succusanus; *L. L.* v. 48; cf. Fest. 302. 15; ep. 115.

⁵ Varro, *De vit. pop. rom.* i, in Non. Marc. 43: "Et extra urbem in regiones xxvi agros viritim liberis attribuit." As this statement does not rest upon an independent source, but is merely an interpretation of Fabius and Cato, it has not the value which Huschke (*Verf. d. Serv. 72 f.*, 85 f.), Mommsen (*Röm. Staatsr.* iii. 168 f.), and Meyer (in *Hermes*, xxx. 11) attach to it.

⁶ Cf. Livy i. 43. 13; Fest. ep. 368.

⁷ IV. 14.

⁸ Dion. Hal. iv. 15.

Varronian notion that these country districts were not so much tribes as regiones, *παῖροι*, but which served all the purposes of tribes including the taking of the census.¹

The various contradictory statements of the ancients regarding the original number of Servian tribes can now be appreciated at their respective values. In the course of the discussion it has become evident, too, that Fabius and Cato, the sources of later annalists, had no tenable ground for their assumption of thirty original tribes. Had they examined the records, perhaps the succeeding parts of their own chronicles, they would have found that before 387 there could have been only twenty-one tribes in all.² A less certain indication of the admission of one or possibly two tribes still earlier in the republic may have existed;³ but here we reach the extreme limit of their knowledge. Any investigation of the number in the regal period, whether by the ancients or by the moderns, must rest not upon contemporary records but upon inference pure and simple. We may inquire, accordingly, whether the view of Mommsen⁴ and Meyer⁵ that the four city tribes were created first and existed for a time before the institution of the rural tribes, having no trustworthy foundation in the sources, can be deduced from our knowledge of the general conditions of the time. We must by all means avoid the supposition of Mommsen⁶ that in the time of Servius there was no private property in land outside of the city.⁷ If then we bear in mind two points which Mommsen has himself established, (1) that the local tribe was an aggregate of private estates,⁸ (2) that the four urban tribes of Servius were limited to the city,⁹ we must conclude that in the time of Servius the country estates were registered in rural tribes—in other

¹ Dion. Hal. iv. 15. 4-6. His idea of a census of the country people he derived from Lucius Piso (§ 5 f.) and from the censors' office through Fabius (22. 2)—a fact which militates against Mommsen's theory that under Servius the country was not yet *ager privatus*.

² Livy vi. 5. 8.

³ P. 56.

⁴ *Röm. Staatsr.* iii. 162 ff.

⁵ *Gesch. d. Alt.* v. 135, 142; *Hermes*, xxx. 11; accepted by Neumann, *Grundherrschaft. röm. Rep.* 14 f.; Kornemann, in *Klio*, v. 90.

⁶ *Röm. Staatsr.* iii. 168.

⁷ P. 50.

⁸ *Röm. Staatsr.* iii. 164 f.

⁹ *Ibid.* 163 and n. 3, in opposition to his former view and that of Grotefend; cf. p. 52.

words that Servius instituted rural as well as urban tribes.¹ The view of Meyer that all the citizens lived in the city and the dependents in the country² — which would afford a ground for assuming the urban tribes to have been earlier than the rural — has no basis either in institutions or in tradition. If originally the country was all-important,³ and if at the dawn of history we find the country and city politically equal, as is actually the case, we have no motive for the insertion of an intermediate stage in which the city was all-important. There was indeed a tendency toward the concentration of political power within the city, but it did not advance beyond the equalization of city and country.⁴ To maintain Meyer's view we should be obliged to complicate the early history of Rome with two revolutions — one by which the city gained supremacy over the country, and the other in which the supremacy was lost. It is mainly to defend the early history of the comitia, and of the constitution in general, against this complication that the

¹ There might remain the conjecture that the *regiones*, or *pagi*, had the same constitution as the tribes, but in that case the difference between *pagus* and *tribus* would be one of name only, and would therefore be without historical significance. Meyer's view (*Gesch. d. Alt.* v. 135, 142) that the sixteen earliest country tribes were not formed till after the institution of the plebeian tribunate depends partly on his notion that the tribunes were originally the heads of the four urban tribes and partly on the difference in the naming, the city tribes being named after localities and the country tribes after gentes; cf. *Hermes*, xxx. 11. The latter circumstance, he asserts, establishes a later origin for the rural tribes. This argument is by no means convincing; the difference may have arisen from different conditions in country and city; probably no urban ward had one patrician gens so predominant as to give its name. If one kind of name is earlier than another, we should naturally suppose the gentile name to be the earlier, and in that case we should prefer the view of Pais, *Stor. di Rom.* I. i. 320, n. 1; *Leg. of Rom. Hist.* 140; cf. above, p. 52, n. 2.

The patrician gentile name does not imply patrician domination any more than the eupatrid name of an Attic deme implies eupatrid domination of that deme.

² *Hermes*, xxx. 12; followed by Neumann, *Grundherrsch. d. röm. Rep.* 13 f.; Kornemann, in *Klio*, v. 90 f.

³ P. 6.

⁴ Among the scholars who insist that originally country as well as city was divided into tribes are Müller, J. J., in *Philol.* xxxiv (1876). 112 ff., and more recently Kubitschek, *De trib. or.* (1882); *Imp. rom. trib. discr.* (1889), 2. Beloch, *Ital. Bund* (1880), 28, begins with twenty-one tribes in 495, considering it impossible to penetrate earlier conditions. Niese, *Röm. Gesch.* (1906). 38 and n. 3, more positively assigns the creation of twenty-one tribes to that date.

present discussion of the early land tenure and of the origin of the Servian tribes is offered.

The original number of tribes, as has been stated, is unknown. It was increased by the acquisition of territory. Possibly the annalists found an obscure trace of the admission of the sixteenth rural tribe — the Claudia — in 504. To that year Livy assigns the coming of Attius Clausus with his host of clients, who were formed into the Claudian tribe.¹ Wissowa² suggests that the immigration of the Claudian gens, the date of which did not appear in the original tradition,³ was arbitrarily assigned to the year in which was recorded the admission of the tribe. This conjecture is supported by the situation of the Claudia, which would place it among the latest of the twenty.

With more confidence we may assign the admission of the seventeenth rural tribe — the twenty-first in the entire list — to 495.⁴ It must have been the Clustumina.⁵ We are certain that

¹ Livy ii. 16. 5; cf. Dion. Hal. v. 40. 5.

² In Pauly-Wissowa, *Real-Encycl.* iii. 2650.

³ Some place the immigration in the time of Titus Tatius; Verg. *Aen.* vii. 706 ff.; Suet. *Tib.* 1; Appian, *Reg.* 12; Mommsen, *Röm. Forsch.* i. 293; *Röm. Staatsr.* iii. 26, n. 1. That the earlier tradition assigned the event to the date mentioned in the text is asserted by Münzer, in Pauly-Wissowa, *ibid.* iii. 2663.

⁴ Livy ii. 21. 7 (495): "Romae tribus una et xxx factae." This statement is not that thirty-one tribes were instituted in that year, but that the number thirty-one was reached, "factae" being copulative. If "una et xxx" is not a copyist's error, it probably depends on the Fabian view that there were originally thirty tribes. At all events it is inconsistent with the later statement (vi. 5. 8) that the number twenty-five was not reached till 387. The epitomator of Livy accordingly corrected the number to twenty-one, which most editors now write in the text itself. That there were twenty-one tribes in 491, when Coriolanus was tried, is assumed too by Dion. Hal. vii. 64. 6: Μιάς γὰρ καὶ ἑκοσὶ τότε φυλῶν οὐσῶν, οἷς ἡ ψῆφος ἀνεδόθη, τὰς ἀπολούσας φυλὰς ἔσχεν ὁ Μάρκιος ἔννεα· ὥστ' εἰ δύο προσῆλθον αὐτῷ φυλαί, διὰ τὴν ἱσοψηφίαν ἀπελέλυτ' ἄν, ὥσπερ ὁ νόμος ἤξιου ("There being at the time twenty-one tribes, to whom the vote was given, Marcius received the votes of nine tribes for acquittal; so that, had two more tribes been favorable, he would have been acquitted by an equality of votes, as the law required"). This is not a mistake, as many assume, but an understatement; cf. Müller, J. J., in *Philol.* xxxiv (1876). 110 f. Meyer's explanation (*Hermes*, xxx. 10, n. 2), which makes διὰ τὴν ἱσοψηφίαν signify "owing to the equal value of the votes," is improbable and unnecessary.

⁵ For the form of the word, see Mommsen, *Röm. Staatsr.* iii. 171; Kubitschek, in Pauly-Wissowa, *Real-Encycl.* iv. 117. Crustumina had been taken four years earlier (Livy ii. 19. 2, 499); so that a tribe of the same name could have been admitted in 495.

there were only twenty-one till 387, when four new tribes were formed, bringing the number up to twenty-five.¹ The twenty-sixth and twenty-seventh were admitted in 358,² the twenty-eighth and twenty-ninth in 332,³ the thirtieth and thirty-first in 318,⁴ the thirty-second and thirty-third in 300,⁵ the thirty-fourth and thirty-fifth in 241.⁶ To the year 90 that number is known to have remained unchanged, and the evidence of a temporary increase during the Social War is obscure. On this point Appian⁷ states that "the Romans did not enroll the newly admitted citizens in the existing thirty-five tribes for fear that, being more numerous, they might outvote the old citizens in the comitia; but by dividing them into ten parts (?) they made new tribes, in which the new citizens voted last." This view of an increase in number is confirmed by a statement of Sisenna⁸ as to the creation of two new tribes at about that time. Velleius⁹ however informs us that the new citizens were enrolled in eight tribes. In the object of the arrangement he agrees with Appian. Next he mentions the promise of Cinna to enroll the Italians in all the tribes. From the connection we should naturally infer that in the opinion of Velleius the new citizens were enrolled before Cinna in eight old tribes; and yet it is difficult to understand how the assembly could be persuaded to visit any group of rural tribes with this disgrace and political disability.¹⁰ As the authority of Sisenna, if not that of Appian, compels us to accept the fact of new tribes, it is better to inter-

¹ Livy vi. 5. 8.

² Ibid. 17. 11.

³ Ibid. x. 9. 14.

⁴ Ibid. viii. 15. 12.

⁵ Ibid. ix. 20. 6.

⁶ Ibid. ep. xix.

⁷ B.C. i. 49. 214: 'Ρωμαῖοι μὲν δὴ τοῦσδε τοὺς νεοπολίτας οὐκ ἐς τὰς πέντε καὶ τριάκοντα φυλὰς, αἱ τότε ἦσαν αὐτοῖς, κατέλεξαν, ἵνα μὴ τῶν ἀρχαίων πλείονες ὄντες ἐν ταῖς χειροτονίαις ἐπικρατοῖεν, ἀλλὰ δεκατεύοντες ἀπέφηναν ἑτέρας, ἐν αἷς ἐχειροτόνουν ἑσχατοί. For δεκατεύοντες scholars have attempted to substitute δέκα, δέκα πέντε, δέκα ἐνεδρεύοντες (Mendelssohn, *App.* ii. p. 53, n.). The meaning given in the rendering offered above, though not found elsewhere, is possible. The passage has reference to the Latins and faithful Italians admitted by the Julian law of 90.

⁸ III. 17 (Peter, *Reliquiae*, i. 280): "L. Calpurnius Piso ex senati consulto duas novas tribus."

⁹ II. 20. 2.

¹⁰ Kubitschek, *Imp. rom. trib. discr.* 2-6, tries to prove that the lex Julia, 90, provided for the enrolment of the Latins and faithful allies in fifteen old rural tribes, and that the lex Plautia Papiria, 89, assigned the more obstinate rebels to eight other existing rural tribes.

pret Velleius in that light.¹ We may suppose then that the eight tribes which he mentions were provided for by the Julian law of 90; and we must accept the statement of Sisenna that in 89 the Calpurnian law "ex senati consulto" created two other new tribes, in which were to be enrolled the citizens admitted under this law. Thus we could account for the ten (?) new tribes mentioned by Appian. As regards the Lucanians and the Samnites, who held out obstinately against Rome, the same historian² states that they were respectively enrolled in tribes, as in the former instances. He does not inform us, however, that for this purpose other new tribes were instituted. At all events there seems to be no essential disagreement among our sources; and we have no reasonable ground for doubting an increase, though we may remain uncertain as to the number added.³

The arrangement was only temporary. In 88 Sulpicius, tribune of the plebs, carried a law containing a provision for the distribution of the new citizens and the libertini among all the thirty-five tribes.⁴ His plebiscite was annulled by the senate on the ground that it had been passed by violence;⁵ but the provisions contained in it were afterward legalized by a senatus consultum, and it was finally carried into effect by Cinna as consul in 84.⁶ This settlement of the question was approved by Sulla⁷ for all the Italians excepting the Marsians and the Paelignians, who were enrolled in one tribe—the Sergia.⁸

The nature of the tribes may be inferred from their object. The intention of the organizer was to introduce the Greek military system, comprising heavy and light infantry, in which the kind of service to be performed depended upon financial

¹ Cf. Madvig, *Röm. Staat.* i. 26 f.

² *B. C.* i. 53. 231.

³ That there was an increase is held by Mommsen, *Röm. Staatsr.* iii. 179, n. 1; Drumann-Gröbe, *Röm. Gesch.* ii. 370. This view is favored by Long, *Rom. Rep.* ii. 199 f. Lange, *Röm. Alt.* iii. 111 f., compromises.

⁴ Livy, ep. lxxvii; App. *B. C.* i. 55. 242; p. 404.

⁵ App. *B. C.* i. 59. 268; Cic. *Phil.* viii. 2. 7.

⁶ Vell. ii. 20. 2; Livy, ep. lxxxiv; App. *B. C.* i. 64. 287; Cic. *ibid.*; Exup. 4; Mommsen, *Röm. Staatsr.* iii. 180, 439.

⁷ Livy, ep. lxxxvi.

⁸ Mommsen, *ibid.* 180.

ability to provide equipments.¹ Seeing that a classification of citizens with respect to property was necessary for this purpose, Servius instituted the tribes as a basis for the census. That they contained the *ager privatus* only is indicated by the exclusion from them of the Capitoline and Aventine hills.² Their local character is established by the concurrent testimony of ancient writers.³ Yet even in the beginning they could but roughly be described as districts, for they excluded all public land and all waters and waste places claimed neither by individuals nor by the government. They retained the approximate character of districts so long only as the territory of annexed communities continued to be formed into new tribes. The process came to an end in 241; and it was as early at least as this date that the Roman colonies, not originally in the tribes, were incorporated in them.⁴ Thereafter the annexation of new territory tended more and more to render the tribes geographically indeterminate.⁵ The process was far advanced by the admission (90-84) of the Latins and Italians with their lands to the existing tribes,⁶ which were further enlarged in the imperial period by the incorporation of provincial communities.⁷ As consisting of lands, though no longer necessarily adjacent, they were still considered local.⁸

The tribe was also a group of persons; in fact the word applies far more frequently to persons than to territory.⁹ During

¹ P. 71. Their military purpose is recognized by Dion. Hal. iv. 14. 2, whereas Livy, i. 43. 13, connects with them nothing but the collection of taxes.

² Livy i. 43. 13; Pliny, *N. H.* xviii. 3. 13; Varro, *L. L.* v. 45; Mommsen, *Röm. Staatsr.* iii. 166, n. 1.

³ Dion. Hal. iv. 14. 2; Laelius Felix, in Gell. xv. 27. 5; Flaccus, in Gell. xvii. 7. 5. In referring to the year 204 Livy, xxix. 37. 3 f., represents the tribes as districts. The Pupinian tribe is often spoken of as a district, as by Varro, *R. R.* i. 9. 5. On the local nature of the urban tribes, see Varro, *L. L.* v. 56; Livy i. 43. 13; Dion. Hal. iv. 14. 1.

⁴ Kubitschek, *Rom. trib. or.* 24 f.; *Imp. rom. trib. descr.* 2.

⁵ Cf. Grotefend, *Imp. rom. trib. descr.* 7.

⁶ Kubitschek, *Imp. rom. trib. descr.* 2 f.

⁷ Cic. *Flac.* 32. 79 f. On the growth of the tribe, see Mommsen, *Röm. Staatsr.* iii. 175 ff.; Kubitschek, *ibid.* See also the maps in the latter work.

⁸ Flaccus, in Gell. xvii. 7. 5. A list was kept of the estates comprising a tribe; Cic. *ibid.*

⁹ Cf. the admission of new tribes; Livy vi. 5. 8: "Tribus quattuor ex novis civibus additae;" viii. 17. 11.

the early republic a considerable degree of harmony was maintained between the two aspects of the institution (1) possibly by a restriction on the transfer of residence,¹ (2) by the change in membership from tribe to tribe, through the censors, on the basis of a transfer of domicile, (3) by the assignment of new citizens to the tribe in or near which they had their homes, (4) by the creation of new tribes for new citizens who did not live in or near the existing tribes. This harmony experienced its first serious disturbance through the enrolment of the landless, irrespective of domicile, in the urban tribes in 304,² but continued to such a degree that a hundred years later the rural voters generally still resided in their own tribes.³ In the last century of the republic the personal tribe, emancipated from the local, depended solely on inheritance and the will of the censors.⁴

The original composition of the personal tribe is determined by its purely military object. It comprised accordingly those only who were liable to service in war. From the early Roman point of view those citizens were qualified who found their livelihood in agriculture.⁵ Not all landowners were enrolled in the tribes; for Latin residents,⁶ freedmen,⁷ widows and orphans,⁸ all of whom might possess land, lacked membership. Those proprietors, too, were excluded whom the censors assigned to the *aerarii* as a punishment. Tribesmen were all

¹ Dion. Hal. iv. 14. 2.

² P. 64.

³ Livy xxix. 37. 3 f.; Soltau, *Altröm. Volksversammlung*. 379, n. 3.

⁴ Somewhat different is the view of Mommsen, *Röm. Trib.* 2 f.; *Röm. Forsch.* i. 151; *Röm. Staatsr.* ii. 402; controverted by Soltau, *ibid.* 384 ff.

⁵ The Romans had but two pursuits, agriculture and war, for the sedentary occupations were given to slaves and strangers; Dion. Hal. ii. 28; ix. 25. 2. It was assumed that those who were without property could take no interest in the state; *ibid.* iv. 9. 3 f.; Livy viii. 20. 4.

⁶ Cf. Mommsen, *Röm. Staatsr.* iii. 630.

⁷ It is well known too that freedmen were not regularly employed in military service; Livy x. 21. 4; p. 354 f. below.

⁸ Widows and orphans were enrolled in a different list from that of the tribes, and hence were not included in the statistics of population which have come down to us; cf. Livy iii. 3. 9; ep. lix; Plut. *Popl.* 12; Mommsen, *Röm. Staatsr.* ii. 365 f., 401. Livy, ii. 56. 3, seems to exclude the clients. Only those lacked membership, however, who possessed no land. Clients of free birth were as liable to military service, according to their ratable property, as any other class of citizens; p. 22.

the other landowners — *adsidui*¹ et *locupletes*² — together with the male descendants of military age under their *potestas*.³

Another object of the tribes, referred to Servius by our sources, was the collection of taxes.⁴ We know that they afterward served this purpose; and the ancient writers, who could have had no direct knowledge of the intentions of Servius but who assigned to him without hesitation all the later developments of his organization, were in this case especially misled by their false derivation of *tributum* from *tribus* or *vice versa*.⁵ A brief study of the facts in the case will prove their inference to be wrong. The most obvious consideration is that had Servius intended the tribes for the levy of taxes as well as for military purposes, he would have included all who were subject to taxation as well as all who were liable to service in the army, whereas in fact he admitted those only who were to serve. It is to be noted that primitive Rome imposed no regular direct taxes on the citizens in general. Every man equipped himself for war even after the introduction of the phalanx;⁶

¹ Law of the Twelve Tables, in Gell. xvi. 10. 5; Schöll, *Leg. Duod. Tab. Rel.* 116; Bruns, *Font. iur.* 18 f.; Cic. *Rosc. Am.* 18. 51; *Att.* iv. 8 a. 3; Fest. ep. 9; Charis. p. 75 (Keil). The derivation from *ab asse dando* proposed by Aelius Stilo, though absurd, was accepted by Cic. *Rep.* ii. 22. 40; *Top.* 2. 10; Fest. ep. 9 (as an alternative); Isid. *Elym.* x. 27; Quint. *Inst.* v. 10. 55. The derivation *ab assidendo* is nearer the truth; Vaniček, *Griech.-lat. Wörterb.* 1012; Lange, *Röm. Alt.* i. 466; Mommsen, *Röm. Staatsr.* iii. 237 f.; Kubitschek, in Pauly-Wissowa, *Real-Encycl.* i. 426. See also Varro, *De vit. pop. rom.* i, in Non. Marc. 67; Gell. xix. 8. 15.

² Cic. *Rep.* ii. 9. 16; 22. 40; P. Nigidius, in Gell. x. 5. 2; Fest. ep. 9, 119; Pliny, *N. H.* xviii. 3. 11; Quint. v. 10. 55; Ovid, *Fast.* v. 281; Vaniček, *ibid.* 506, 1149.

³ The army in the field must have consisted largely of men in *patris aut avi potestate*, whose names were reported to the censors, not for taxation but for military service, by those who had authority over them; cf. Livy xxiv. 11. 7; xliii. 14; Dion. Hal. ix. 36. 3; Fest. ep. 66. Scipio's complaint (Gell. v. 19. 16: "In alia tribu patrem, in alia filium suffragium ferre") indicates that the sons were regularly enrolled in the tribe of the father. That the list comprised plebeians only (Niebuhr, *Röm. Gesch.* i. 457 f.) has proved untenable; Mommsen, *Röm. Forsch.* i. 153 f.

⁴ Dion. Hal. iv. 14. 2; Livy i. 43. 14; Varro, *L. L.* v. 181.

⁵ Livy, *ibid.*; Varro, *ibid.*; cf. p. 63, n. 4 below.

⁶ Dion. Hal. iv. 19. 3; Fest. ep. 9; Ennius, in Gell. xvi. 10. 1; cf. 12 f. Before the introduction of pay for military service in 406 the soldiers bore their own expenses; Livy iv. 59. 11; v. 4. 5; viii. 8. 3; Flor. i. 6. 8; Diod. xiv. 16. 5; Lyd. *De mag.* i. 45 f.; p. 71 ff. below.

doubtless at first the knights provided their own horses;¹ and in short campaigns the soldiers carried their provisions from their own farms.² Fortifications and public buildings were erected by forced task-work. The king supported himself partly by gifts from his subjects and partly from the public property, including land.³ Other early sources of revenue were tolls levied for the use of harbors, boundaries, temples, bridges, roads, sewers, and salt works.⁴ In time the idea arose, too, that the person who did not perform military service should help with his property in the defence of the country. The estates of widows and orphans were accordingly taxed to support the horses of the knights.⁵ Those men, also, who were exempt from service because they possessed no land⁶ and yet had other property were required to pay on it a regular tax. From this connection with the public treasury (*aerarium*) they were termed *aerarii*. This class comprised shopkeepers and merchants. Sometimes the censors assigned to it as a punishment men who owned land. The fact that such persons were at the same time removed from their tribes is sufficient proof that the *aerarii* were originally outside these associations.⁷ The *cives sine suffragio*, or *Caerites*, after this class had come into existence in 353, were like the *aerarii* in (1) that they did not belong to the tribes, (2) that they paid a regular tax, (3) that men were placed on their list as a punishment. They may accordingly be regarded as a special class of *aerarii*, enrolled as

¹ Plutarch, *Cam.* 2, makes Camillus the author of the tax on orphans for the support of the knights' horses, thus connecting this measure with the general introduction of pay — a statement of some importance notwithstanding Kubitschek, in Pauly-Wissowa, *Real-Encycl.* i. 683.

² Zon. vii. 20: *Οἱ κάσιτοι ἐστρατεύοντο*.

³ Cic. *Rep.* v. 2. 3.

⁴ Marquardt, *Röm. Staatsv.* ii. 150 f., 159 f. with citations.

⁵ Cic. *Rep.* ii. 20. 36; Livy i. 43. 9; Plut. *Cam.* 2.

⁶ Lange, *Röm. All.* i. 469, is of the opinion that before Servius all the plebeians had this standing, and that Servius left the newly conquered plebeians in that class, because if admitted to the army, they might revolt! Cf. Herzog, *Röm. Staatsverf.* i. 95.

⁷ On the meaning of the word, see Pseud. Ascon. 103: "Ut pro capite suo tributū nomine aera praeberet." On the removal from the tribe into this class; Livy iv. 24. 7; xxiv. 18. 6, 8; 43. 3; xlv. 16. 8. The removal from the tribe is understood when it is not mentioned; Varro, in Non. Marc. 190; Livy ix. 34. 9; xxvii. 11. 15; Gell. iv. 12.

they were in a distinct list.¹ Whereas the *cives sine suffragio* either wholly lacked the franchise, as the phrase implies, or at most had but the right of the Latins,² the other *aerarii* must have voted in the proletarian century.³

The ordinary taxes sufficed for the usual light expenses; but in case of especial need an extraordinary tax was imposed upon the citizens. It was called *tributum* from *tribuere*, "to apportion," because it was distributed among the citizens in proportion to their ratable property.⁴ We hear of such a tax levied for ransoming the city from the Gauls⁵ and another for the building of a wall;⁶ but the most common use was for the payment of soldiers, hence the *tributum* was thought of primarily as a war tax.⁷ For this reason *tributum* came to be correlative with *stipendium*.⁸ It was not often imposed before the introduction of pay in 406.⁹ Even then it was not levied every year; it was sometimes refunded when the condition of the treasury permitted; and it fell into disuse after 167.¹⁰ As it was imposed

¹ Livy vii. 20. 7; Dio Cass. Frag. 33; Strabo v. 2. 3; Gell. xvi. 13. 7; Schol. Hor. *Ep.* i. 6. 62. On the *aerarii* and *Caerites*, see further Mommsen, *Röm. Staatsr.* ii. 392-4, 401 ff., 406; Kubitschek, in Pauly-Wissowa, *Real-Encycl.* i. 674-6; iii. 1284 f.; Hülsen, *ibid.* iii. 1281 f.; see also the works of Herzog, Lange, Madvig, and Willems.

² P. 466, n. 2.

³ It would be absurd to suppose that while the absolutely poor citizens could vote in the proletarian century, those who possessed considerable wealth, though not in land, were excluded.

⁴ Unutterable confusion was brought into this subject by Varro, *L. L.* v. 181: "*Tributum dictum a tribubus, quod ea pecunia, quae populo imperata erat, tributum a singulis pro portione census exigebatur*;" cf. Livy i. 43. 13; Isid. *Etym.* xvi. 18. 7. Neither is *tributum* derived from *tribus* nor *vice versa*. *Tribuere* signifies "to divide," "to apportion;" *tributum*, "that which is apportioned," *tribus* being only indirectly connected with these words; Schlossmann, in *Archiv f. lat. Lexicog.* xiv (1905). 25-40.

⁵ Livy vi. 14. 12.

⁶ *Ibid.* 32. 1.

⁷ Dion. Hal. v. 20; cf. iv. 11. 2; xi. 63. 2; Plut. *Popl.* 12.

⁸ Livy ii. 9. 6; xxiii. 48. 8; xxxiii. 42. 4; xxxix. 7. 5; Pliny, *N. H.* xxxiv. 6. 23; Marquardt, *Röm. Staatsv.* ii. 162, n. 4.

⁹ Instances of public expenditure for the equipment or pay of troops before this date (Dion. Hal. v. 47. 1; viii. 68. 3; ix. 59. 4; Livy iv. 36. 2) are either exceptional or more probably historical anticipations of later usage. That before 406 the soldiers drew pay from their tribes (Mommsen, *Röm. Trib.* 32; Lange, *Röm. All.* i. 540) is disproved by Soltau, *Allröm Volksversamml.* 407 f.

¹⁰ Marquardt, *ibid.* 164-7.

on those only who were liable to military duty,¹ the tribe lists were followed in its collection, and in this sense we may say that it was collected *tributum*.² The work was done by state functionaries, as the tribe, so far as we know, had neither fiscal officers³ nor a treasury; and possessing no property, it could not be held financially responsible.

An epoch in the history of the tribes was made in 312 by Appius Claudius Caecus the censor, who enrolled the landless citizens, proletarians as well as *aerarii*, in the existing thirty-three tribes without discrimination.⁴ *Cives sine suffragio* were alone excepted.⁵ By giving the landless the upper hand in the assemblies this measure roused the animosity of the proprietors, and thus endangered the peace of the state. In order to soothe the excited feelings of the better class, Q. Fabius Rullianus, censor in 304, supported by his colleague Decius, removed the landless from the rural tribes; but not to deprive them wholly of tribal privileges, he registered them in the four urban tribes. Hence his measure is spoken of as a compromise. Thereafter the landholding and hence more respectable citizens were preferably enrolled in the rural tribes,⁶ whereas the landless were confined to those of the city.⁷ It was a permanent gain that henceforth tribal membership was a test of perfect citizenship. The censors still had the power to transfer a man from one tribe to another, for instance, from a rural to an urban tribe; but they could not exclude him wholly from the tribes,

¹ Cf. Mommsen, *Röm. Staatsr.* ii. 392.

² Varro, *L. L.* v. 181.

³ The function of the *tribuni aerarii* was to pay the soldiers; Cato, *Epist. Quæst.* I, in Gell. vi (vii). 10. 2; Varro, v. 181; Fest. ep. 2; Pliny, *N. H.* xxxiv. 1. 1. Perhaps they also collected money into the treasury; Cic. *Att.* i. 16. 3. From Cato's statement they appear to have been financially responsible; and we are informed that as early as 100 they constituted a rank (*ordo*) evidently next below the equites; Cic. *Rab. Perd.* 9. 27. Under the Aurelian law of 70 they made up a decury of jurors; Cic. *Att.* i. 16. 3; Pliny, *N. H.* xxxiii. 1. 31. From these facts it is clear that the *aerarian* tribunes were officers of the *aerarium*, but no connection with the tribes can be discovered; Soltau, *Altröm. Volksversammlung.* 409-12.

⁴ Diod. xx. 46; Livy ix. 46. 10 f.; cf. Mommsen, *Röm. Staatsr.* ii. 403.

⁵ Mommsen, *ibid.* This class came to an end in the Social War; Kubitschek, in Pauly-Wissowa, *Real-Encycl.* iii. 1285.

⁶ In Mommsen's opinion (*Röm. Staatsr.* ii. 403) these censors transferred to the country tribes as many landholding members of the urban tribes as possible.

⁷ Livy ix. 46. 13 f.

for that would be tantamount to depriving him of the citizenship.¹ There were still *aerarii*; individuals and sometimes large groups of citizens were still assigned as a punishment to this class, which, however, was henceforth included in the tribes of the city.² Although the ordinary urban tribesmen were usually exempt from military duty, the *aerarii* were required to serve, at times under especially hard conditions,³ and were not disqualified for office.⁴ In registering them in the tribes Claudius made them, like the landowners, liable to military service and to the *tributum* according to their means. To effect this object he necessarily assessed their personal property on a money valuation; and in order to treat all tribesmen alike, he must have changed the terms of valuation of the landholders' estates from *iugera* to money.⁵

Niebuhr, B. G., *Römische Geschichte*, i. 422-50, Eng. 200-12; Schwegler, *Römische Geschichte*, I. bk. xvii; Huschke, Ph. E., *Verfassung des Königs Servius Tullius*, ch. iii; Ihne, W., *History of Rome*, i. 62, 114; Nissen, H., *Templum*, 144 ff.; *Italische Landeskunde*, ii. 503 f.; Beloch, J., *Italischer Bund unter Roms Hegemonie*, ch. ii; Soltau, W., *Altröm. Volksversammlungen*, 375-548; Meyer, E., *Ursprung des Tribunats und die Gemeinde der vier Tribus*, in *Hermes*, xxx (1895). 1-24; controverted by Sp. Vassis, in *Athena*, ix (1897). 470-2; Neumann, K. J., *Grundherrschaft der röm. Republik*; Siebert, W., *Ueber Appius Claudius Caecus*; Mommsen, Th., *History of Rome*, bk. I. ch. vi; *Röm. Tribus*; *Röm. Staatsrecht*, iii. 161-98; *Abriss des röm. Staatsrechts*, 28-36; Marquardt, J., *Röm. Staatsv.* ii. 149-80; Willems, P., *Droit public Romain*, 40 ff., 98 ff.; Mispoulet, J. B., *Institutions politiques des Romains*, i. 37-42; *Études d'institutions Romaines*, 3-48; Lange, L., *Röm. Allertümer*, i. 501-22, and see index s. Tribus; Madvig, J. N., *Verfassung und Verwaltung des röm. Staates*, i. 100-8; Herzog, E., *Geschichte und System der röm. Staatsverfassung*, i. 39, 101 ff., 1016-31; Grotefend, C. L., *Imperium romanum tributum descriptum*; Kubitschek, J. W., *De romanorum tribuum origine ac propagatione*; *Imperium romanum tributum descriptum*; Pauly-Wissowa, *Real-Encycl.* i. 674-6: *Aerarius* (Kubitschek); 682-4: *Aes equestre* (idem); 780-93: *Ager* (idem); iii. 1281-3: *Caere* (Hülssen); 2650 f.: *Claudia* (Wissowa); iv. 117 f.: *Clustumina* (Kubitschek); Daremberg et Saglio, *Dict.* i. 125: *Aes equestre* and *hordearium* (Humbert).

¹ Livy xlv. 15.

² The expression *tribu movere* or in *aerarios referre* was still used, but meant no more than the transfer from a rural to an urban tribe and to the *aerarian* class within the latter; p. 62, n. 7.

³ Cf. Livy xxiv. 18. 8 f.

⁴ Livy xxiv. 43. 2 f.; Cic. *Cluent.* 42. 120.

⁵ P. 86.

CHAPTER IV

THE CENTURIES AND THE CLASSES

THE ancient authorities represent Servius Tullius as the founder of an organization at once military and political — on the one hand the army composed of classes and centuries, and on the other the *comitia centuriata*. According to Livy ¹ —

“From those whose rating was 100,000 asses or more he made 80 centuries, 40 of seniors and 40 of juniors, and termed them all the *first* class. The seniors were to be ready for guarding the city and the juniors were to serve in the field. The arms required of them were a helmet, round shield, greaves, and cuirass, — all bronze, — for the protection of the body. Their offensive weapons were a spear and a sword. To this class were added two centuries of sappers who were to serve without arms. Their duty was to convey the engines of war. The *second* class was made up of those whose rating was between 75,000 and 100,000 asses, 20 centuries of seniors and juniors together. They were equipped with an oblong shield (*scutum*) instead of a round one, and they lacked the cuirass, but in all other respects their arms were the same. The minimal rating of the *third* class was 50,000 asses, and the number of centuries was the same with the same distinction of age, and there was no change in arms excepting that greaves were not required. In the *fourth* were those appraised at 25,000 asses. They had the same number of centuries but their arms were changed, nothing being assigned them but a spear and a long javelin. The *fifth* class was larger, composed of 30 centuries. They carried slings and stones for throwing. Among them were counted the *accensi*, the hornblowers, and the trumpeters, 3 centuries. This class was appraised at 11,000 asses. Those whose rating was less formed one century exempt from military service. Having thus armed and organized the infantry, he levied 12 centuries of equites from among the chief men of the state. Also the 3 centuries instituted by Romulus he made into 6 others of the same names as those under which the three had originally been inaugurated.” Afterward Livy speaks of the votes of the centuries in the *comitia*.

The ultimate source of this description, as well as of the similar account given by Dionysius, is the censorial document already mentioned,² sometimes termed the “*discriptio cen-*

¹ I. 43. The account given by Dionysius Hal. iv. 16 f.; vii. 59, is the same in principle, though slightly different in detail.

² P. 52.

turiarum,"¹ sometimes "Commentarii Servi Tullii"² on the supposition that Servius was the author. In reality it belonged to the Censoriae Tabulae³ of the period immediately following 269.⁴ The document gave a list of the classes, centuries, and ratings, and furnished directions for holding the centuriate assembly. As the military divisions and equipments mentioned by Livy in the passage above had been discarded long before this date,⁵ they could not have been described in the document. The account of them found in our sources must, therefore, have been supplied by antiquarian study.⁶ The annalist who first used these Tabulae in the censorial archives was Fabius Pictor.⁷ Whether Livy and Dionysius derived their account directly from him or through a later annalist cannot be determined.⁸ Though Cicero's source may ultimately have been the same, he seems to have depended largely on his memory and is chronologically, though not in substance, less exact. In assigning seventy rather than eighty centuries to the first class he most probably has in mind a stage of transition from the earlier to the reformed organization.⁹

A brief analysis of this description, as presented by Livy or Dionysius, will prove that it could not apply at the same time to

¹ Fest. 246. 30; or "discriptio classium," ibid. 249. 1.

² Livy i. 60. 4.

³ Quoted by Cic. *Orat.* 46. 156, for the forms "centuria fabrum" and "procum." Varro, *L. L.* vi. 86²-8, is an extract from the Tabulae of later time; cf. Mommsen, *Röm. Staatsr.* iii. 245, n. 1.

⁴ P. 52. Proof of the date is the fact that the ratings are in the sextantarian *as*, legally adopted in 269 or 268 (page 86). The *as* of this standard was valued at one tenth of a denarius, so that 1000 asses = 100 denarii = 1 mina; Dion. Hal. iv. 16 f.; Polyb. vi. 23. 15: *Οἱ ὑπὲρ τὰς μύrias τιμώμενοι δραχμαί*, descriptive of the highest rating—100,000 asses; Mommsen, *Röm. Staatsr.* iii. 249, n. 4; Hill, *Greek and Roman Coins*, 47. It could not have been later than 241, in which year the reform of the centuriate assembly must have been far advanced, if not completed; page 215.

⁵ P. 84.

⁶ It is wrong to suppose with Soltau, in *Jahrb. f. cl. Philol.* xli (1895). 412, n. 6, that all the details of the Servian system were known only in this way.

⁷ Cf. Livy i. 44. 2; Dion. Hal. iv. 15. 1.

⁸ Smith, *Röm. Timokr.* 9 ff., supposes Calpurnius Piso to have been the intermediary. But a problem in which so many of the quantities are unknown is incapable of solution.

⁹ P. 205, n. 5, 215.

an army and a political assembly: (1) The century of proletarians, which formed a part of the comitia, and which according to Dionysius was larger than all the rest together, was exempt from military service.¹ (2) The unarmed supernumeraries termed *accensi velati* must in their military function have lacked the centuriate organization, as will hereafter be made clear.² (3) The musicians and the skilled workmen who accompanied the army must also be eliminated from the centuriate organization of the army.³ (4) The seniors, too, lacked the centuriate military organization.⁴ (5) Thus the only *pedites* in the original centuriate system were the juniors. Even the military century of juniors was not in the beginning strictly identical with a voting century; and as time progressed, the one group diverged more and more widely from the other.⁵

Chiefly from these facts, which will become clear in the course of this study, we are warranted in concluding that the army was at no time identical with the *comitia centuriata*. As one was necessarily an outgrowth of the other, the military organization must have been the earlier. If therefore the original form of the centuriate system is to be referred to Servius Tullius, he will be considered the organizer of the phalanx, which the military centuries constituted,⁶ not of the comitia.⁷ This result harmonizes with the view of the ancient writers that the *comitia centuriata* exercised no functions—hence we have a right to infer that it had no existence—before the beginning of the republic.⁸

The following sketch of the development of the Roman military system from the earliest times to the institution of the manipular legion includes those features only which are essential to an understanding of the origin and early character of the centuriate assembly. The view maintained in this volume is, as suggested in the preceding paragraph, that the comitia

¹ Livy i. 43. 8; Dion. Hal. iv. 18. 2; p. 207.

² P. 80.

³ P. 81.

⁴ P. 81.

⁵ P. 82 f.

⁶ Livy viii. 8. 3; Dion. Hal. iv. 22. 1.

⁷ It is unnecessary here to consider the question as to the historical personality of Servius Tullius. In this volume the name will be given to the king (or group of kings?) who instituted the so-called Servian tribes and the military centuries and made a beginning of the census.

⁸ P. 201.

centuriata in the form described by Livy and Dionysius developed from the early republican military organization, which was itself the result of a gradual growth. Reference is made to equipments chiefly for the purpose of throwing light on the relation of the Roman to the Greek organization and of the various Roman military divisions to one another.

I. *The Primitive Graeco-Italic Army and the Origin of the Phalanx*

Recent research has brought to light a period of Italian history during which the military system of the Latins and Etruscans closely resembled that of the Mycenaean, the former doubtless being derived in large part from the latter.¹ The nobleman,² equipped in heavy armor, rode forth in his chariot³ to challenge his peer among the enemy to personal combat. The mass of common footmen were probably grouped in tribes and curiae (Greek phratries, brotherhoods),⁴ as in Homeric

¹ Helbig, *Sur les attributs des saliens*, in *Mémoires de l'acad. d. inscr. et belles-let.* xxxvii (1906). 230 ff.; cf. *Comptes rendus de l'acad.* etc. 1904. ii. 206-12. Helbig finds that the Latino-Etruscan equipments of the time preceding Hellenic influence, as shown by archaeology, correspond closely with those of the Salii, whom he regards therefore as religious survivals from that early civilization. It is from archaeological data, combined with the well-known equipment of the Salii, that the close resemblance between the early Latino-Etruscan and the Mycenaean military system is established.

² Not merely the chief, as Helbig, *Comptes rendus*, 1900. 517, supposes. The ἡγέται καὶ παραβῆται who fought at Delium, and whom he rightly regards as a survival from the age of war-chariots, acted as a company not as individuals; Diod. xii. 70. 1.

³ Helbig, *Le Currus du roi Romain*, in *Mélanges Perrot*, 167 f. It was like that chiseled on a gravestone found by Dr. Schliemann on the acropolis of Mycenae, in the main identical with the Homeric chariot, represented in later time on the famous sarcophagus at Clazomenae; Pellegrini, in Milani, *Studi e materiali*, i. 91-3, 98.

⁴ That the army of Romulus — the primitive Roman army — was a single legion, and that the Servian reform consisted accordingly in doubling it, is an ancient hypothesis accepted by some moderns, as Smith, *Röm. Timokr.* 38 f. An organization in definite numbers, however, as 1000 from each tribe, cannot arise till the state has grown sufficiently populous to make up the army of a part only of its available strength, when folk and army have ceased to be identical (Schrader, *Reallex.* 350), and it is agreed that this condition was not reached till after the adoption of the Servian reform; Delbrück, *Gesch. d. Kriegsk.* i. 225; Smith, *ibid.* 52 f., 56.

Greece¹ and among the early Europeans² before the development of an organization based on a numerical system. The arms of the footmen must have been lighter, and probably varied with the individual's financial resources. These common troops could have had no special training or discipline, as they counted for little in war.³ Yet in the Homeric age of Greece some attempt was made to keep the fighters in line, and to prevent the champions from advancing beyond it to single combat.⁴ A similar tendency to even, rhythmic movement may be inferred for the Latin army.⁵ The great innovators in this direction were the Lacedaemonians, to whom the honor of inventing the phalanx is chiefly due.⁶ This improvement, which made an epoch in European warfare, could not have been later than the eighth century B.C. The phalanx was a line, several ranks deep, of heavy-armed warriors, who moved as a unit to the sound of music.⁷ The depth varied as the occasion demanded; it was not necessarily uniform throughout the line, but for Lacedaemon eight may be considered normal.⁸ The heavy-armed trooper carried a large shield, which covered the entire body, a helmet, and greaves; his offensive weapons were sword and spear.⁹ Tyrtæus mentions also a coat of mail though not as an essential part of the equipment.¹⁰ The metal of their defen-

¹ *Il.* ii. 362.

² Schrader, *ibid.* For the Sueves, see Caesar, *B.G.* iv. 1; for the Lacedaemonian army, see p. 71. The assumption of Helbig, *Comptes rendus*, 1904. ii. 209, that the army was composed of patricians only is altogether unwarranted. Equally groundless is the notion of Soltau, *Altröm. Volksversammlung*, 250, that the Homeric army was composed chiefly of nobles with a few light-armed dependents.

³ Cf. Liers, *Kriegswesen der Alten*, 78; Niese in *Hist. Zeitschr.* xcvi (1907). 264, 266, 289.

⁴ *Il.* iv. 293 ff.

⁵ Represented by the dances of the Salii; Helbig, *ibid.*, 211 f.

⁶ Paus. iv. 8. 11; Polyæn. i. 10; Delbrück, *Gesch. d. Kriegssk.* i. 30 f.; Niese, in *Hist. Zeitschr.* xcvi (1907). 274 ff.

⁷ Cf. Thuc. v. 70; Polyæn. i. 10.

⁸ Cf. Thuc. v. 69. For this and other depths, see Delbrück, *ibid.* i. 25; Liers, *Kriegswesen der Alten*, 45; Lammert, in *N. Jahrb. f. kl. Philol.* xiii (1904). 276 f.

⁹ Tyrtæus, *Frag.* xi (Bergk). For the shield which covered "hips, legs, breast, and shoulders," v. 23 f. It was abolished by Cleomenes III; Plut. *Cleom.* 11; cf. Liers, *ibid.* 34; Lammert, *ibid.* 276 f.

¹⁰ XII. 26; Xen. *Anab.* i. 2. 16. A public gift of a bronze cuirass is mentioned by Aristotle, *Lac. Pol.* 75, Müller, *Frag. Hist. Graec.* ii. p. 127. Gilbert, *Const. Antiq.* 73; Delbrück, *ibid.* 25, maintain that the cuirass was a regular part of the equipment. This is true of soldiers who carried smaller shields.

sive armor was mostly bronze; their swords and spear-points were probably iron, which the mines of Laconia abundantly supplied.¹ Although it is well known that the phalanx was composed of smaller units, the original organization can only be conjectured. It is not unlikely that in the beginning there were tribal regiments,² divided into companies of fifty or perhaps a hundred,³ which were made up of still smaller groups. The military age extended from the twentieth to the sixtieth year.⁴

The phalanx was readily adopted by other Greek states, which modified it to suit their several conditions. In Athens and probably elsewhere the army had a tribal organization,⁵ but a census was introduced in order to determine who possessed sufficient wealth for service on horseback, in the heavy infantry, and in the light infantry; and when once the census classes were adopted, it was easy to extend them to political uses. In this way the four property classes at Athens, probably instituted about the middle of the seventh century B.C.,⁶ became under Solon if not earlier a basis for the distribution of offices and other political privileges. Naturally the Greeks of Sicily and Italy adopted the phalanx, and it is reasonable to suppose that the Romans derived it, through the Etruscans,⁷ from one of these neighbors.

¹ Beloch, *Griech. Gesch.* i. 200 f.; cf. Liers, *Kriegswesen der Alten*, 34 f.; Droysen, *Griech. Kriegsalt.* 3 ff.

² Cf. the name of one of these regiments Μεσσοδρῆς (Schol. Thuc. iv. 8) derived from the village or local tribe Messoia. Schol. Aristoph. *Lysistr.* 453, mentions five by name; cf. Aristotle, *Frag.* 541. Perhaps a sixth for guarding the kings was drawn from all the tribes; Busolt, *Griech. Gesch.* i. 535 ff. with notes. Lenschau, in *Jahresb. d. Altwiss.* cxxxv. 83, holds that there were but four phylae.

³ The name pentecosty indicates that it originally comprised fifty men, which suggests that the century may have been a higher group. Before the Peloponnesian War (Thuc. v. 68) the Lacedaemonian organization had departed far from its original form.

⁴ Droysen, *Griech. Kriegsalt.* 70; Gilbert, *Const. Antig.* 72. Compulsory service beyond the border ceased with the fortieth year; Xen. *Hell.* v. 4. 13.

⁵ Cf. Liers, *Kriegsw. der Alten*, 14.

⁶ Busolt, *Griech. Gesch.* ii. 180 ff.; Helbig, in *Mém. de l'acad. des inscr.* xxxvii¹ (1904). 164. But the Athenian army did not become efficient till long after Solon; cf. Niese, in *Hist. Zeitschr.* xcvi (1907). 278-82.

⁷ The Romans believed that they got the phalanx from the Etruscans; *Ined. Vat.*, in *Hermes*, xxvii (1892). 121 from an early historian, Fabius Pictor or Posidonius or Polybius (Pais, *Anc. Italy*, 323); Diod. xxiii. 2 (Müller); Athen. vi. 106.

II. *The Servian Army*

As the heavy troops of the Greek line were all armed alike, the Romans probably at first composed their phalanx in a similar way, without gradations of equipment. The complex system of census groupings in the army as we find it immediately before the institution of the manipular legion could only have resulted from a long development. The statement last made finds justification in the fact that the term *classis*¹ was originally limited to the first or highest census group, all the rest being "infra classem."²

Not only was the organization like that of the Greeks, but the arms, too, were in the main Greek. The soldiers of the *classis* were equipped with helmet, shield, greaves, spear, and sword; as they wore a cuirass, they used a large round Etruscan buckler³ instead of the man-covering Dorian shield. They

p. 273 f.; Wendling, in *Hermes*, xxviii (1893). 335 ff.; Müller-Decke, *Etrusker*, i. 364 ff.; Smith, *Röm. Timokr.* 40. The circumstance does not prove that the Romans were then in subjection to the Etruscans.

¹ Some of the ancients derive *classis* from *calare*, "to call," hence "summoning;" Dion. Hal. iv. 18. 2; Quint. *Inst.* i. 6. 33; accepted by Walde, *Lat. Etym. Wörterb.* 125; Soltau, *Alltröm. Volksversamml.* 242; Lange, *Röm. Alt.* i. 464. Others connected it with *kālos* "firewood," hence "gathering;" Serv. in *Aen.* i. 39; Isid. *Etym.* xix. 1. 15; Schol. Luc. i. 306. Corssen, *Ausspr.* i. 494, proposes to derive it from a root "clat," which appears in the Greek *κλητεύειν* (Lat. *clat-ē-re), Germ. laden, which would still give the meaning "summoning;" cf. Curtius, *Griech. Etym.* 139; Vaniček, *Griech. Lat. etym. Wörterb.* 143 (*cla-t, cla-t-ti-s). Mommsen accepted the meaning "summoning" in the early editions of his *History*, but rejects it in the *Staatsrecht*, iii. 262 f. (cf. his *History*, English ed. i. 1900. 115 f., 118) on the ground that however adapted it may have been to the later political classes, it could not well apply to the fleet and army, and hence could not belong to the earlier use of the word, which denoted the line in contrast with those who fought outside the line. But against his reasoning it could be urged that *classis* with the idea of "summoning" first applied to the line of heavy infantry—the only effective part of the army; and when once the connotation of "line" had been established, it could easily extend to the fleet.

² Gell. vi (vii). 13: "Classici dicebantur non omnes, qui in quinque classibus erant, sed primae tantum classis homines, qui centum et viginti quinque milia aeris ampliusve censi erant. 'Infra classem' autem appellabantur secundae classis ceterarumque omnium classium, qui minore summa aeris, quod supra dixi, censebantur. Hoc eo strictim notavi, quoniam in M. Catonis oratione, qua Voconiam legem suavit, quaeri solet, quid sit 'classicus,' quid 'infra classem,'" Fest. ep. 113; cf. Cic. *Verr.* II. i. 41. 104; Pseud. Ascon. 188; Gaius ii. 274.

³ The statement of Diod. xxiii. 2 (Müller), and of the *Ined. Vat.* (in *Hermes*, xxvii. 121) that the Romans derived their round shield from the Etruscans accords with

were grouped in centuries,¹ forty of which composed the classis in the fully developed phalanx.² The age of service of the juniors, who alone fought in the field, extended from the completed seventeenth to the completed forty-sixth year,³ whereas the seniors from the forty-seventh to the sixtieth year formed a reserve.

A still nearer connection can be found between the Roman and the Greek horsemen. As is proved by archaeology, the earliest Greek knights had no specialized weapons or armor and were not accustomed to fight on horseback, but were heavy infantry who used their horses simply as conveyance.⁴ The same is true of the earliest Roman equites, whose equipment closely resembled that of the Greek horsemen. On account of their swiftness they were primitively called *celerēs*.⁵ Although these mounted footmen are generally known as equites, which in this sense may but loosely be translated knights, the Romans did not institute a true cavalry till the period of the Samnite wars.⁶ It is a curious fact that some horsemen, Roman as well as Greek, were provided each with two horses,⁷ one for the warrior and the other for his squire,⁸ and that the mounted

archaeological evidence for the use of the round shield by the early Etruscans; Pellegrini, in Milani, *Studi e materiali*, i. 91 ff.; Helbig, in *Comptes rendus de l'acad. des inscr.* 1904. ii. 196.

¹ The notion of Delbrück, *Gesch. d. Kriegsk.* i. 227, that the army was not organized in centuries till after the beginning of the republic has no foundation whatever.

² P. 76. The original number cannot be determined.

³ Tubero, in Gell. x. 28. 1; Non. Marc. 523. 24. From this fact it appears that military conditions made a far greater demand upon the early Romans than upon the Lacedaemonians.

⁴ Helbig, in *Comptes rendus de l'acad. des inscr.* 1900. 516 ff.; *Mém. de l'acad.* etc. xxxvii¹ (1904). 157 ff.; *Hermes* xl (1905). 109. The objection of Smith, *Röm. Timokr.* 37, n. 3, is not well founded.

⁵ Incertus Auctor (Huschke), p. 1.

⁶ *Ined. Vat.*, in *Hermes* xxvii (1892). 121; Helbig, *ibid.* xl (1905). 114. The *transvectio equitum* was instituted in 304; Livy ix. 46. 15. On the close connection of the Roman cavalry with that of the Greeks of southern Italy, see Pais, *Storia di Roma*, I. ii. 607, n. 1.

⁷ The priores had each two horses; Granius Licinianus xxvi, p. 29: "Verum de equitibus non omittam, quos Tarquinius ita constituit, ut priores equites binos equos in proelium ducerent;" cf. Fest. ep. 221. On the Tarentine cavalry, see Livy xxxiii. 29, 5. The inference is that the posteriores had one horse each.

⁸ Helbig, in *Hermes* xl (1905). 107. *Notizie degli Scavi*, 1899. 167, fig. 17 (cf. p. 157); 1900. 325, fig. 28; Pellegrini, in Milani, *Studi e materiali*, i. 106.

soldiers of Etruria were in these respects the same.¹ A further resemblance between the earliest Greek and Roman horsemen lies in the fact that they were noble.²

In their account of the growth of the mounted service during the regal period the ancient authorities show great inconsistencies. It seems probable that the early annalists pictured the increase in the knights in a way analogous to that of the senate: at first Romulus formed a troop, or century, from the Ramnes; afterward a second was added from the Tities; and still later the Luceres furnished a third.³ Then Tarquinius Priscus doubled the number, making six in all, and Servius finally increased it to eighteen centuries. This simple development, itself a reconstruction, was complicated by the desire of the historians to make the number of knights under Servius agree with the number under Augustus, given by Dionysius⁴ at about 5000; hence the assumption of 200 or even 300 knights to the century as early as the reign of Romulus.⁵ It is possible by clearing away these evident misconceptions to discover the approximate truth.

When the chariot gave way to the horseback rider is not definitely known; at all events the change seems to have taken place under Hellenic influence, and could hardly therefore have been earlier than the beginning of the seventh century B.C.⁶ The idea of the sources is that there came to be three troops of horsemen, furnished by the tribes,⁷ as well as three regiments of foot, that before Servius the number of troops of horse was doubled, and that the six troops thus formed were named accordingly after the tribes Ramnenses, Titienses, and Lucerenses priores and posteriores respectively.⁸ The priores had each two horses, the posteriores one.⁹ Hence the essential difference

¹ Pellegrini, *ibid.* i. 97, fig. 5; 104, fig. 10. ² P. 75. ³ P. 3, n. 8. ⁴ VI. 13. 4.

⁵ The principal sources are Cic. *Rep.* ii. 20. 36; 22. 39; Livy i. 13. 8; 15. 8; 36. 7; 43. 8 f.; Dion. Hal. ii. 13; vi. 13. 4; Pliny, *N. H.* xxxiii. (9.) 35; Fest. ep. 55; Plut. *Rom.* 13. On the basis of these sources we could reckon an increase to 1800, 3600, or 5400 according to our assumption as to the number of horsemen to the century; cf. Gerathewohl, *Die Reiter und die Rittercenturien*, 3-8.

⁶ Helbig, in *Hermes*, xl (1905). 101, 105, 107.

⁷ Livy i. 13. 8; Dion. Hal. ii. 13. 1 f.; Fest. ep. 55.

⁸ Cic. *Rep.* ii. 20. 36; Livy i. 36. 2, 7; Fest. 344. 20; ep. 349. Writers differ slightly in the form of the names.

⁹ P. 73, n. 7.

between these divisions was in rank and wealth rather than in the relative time of their institution. Long after Servius both divisions continued to be patrician.¹ As the centuriate organization of Servius applied to the infantry, the cavalry remained little affected by it. The six troops with their old names survived, and eventually became a part of the *comitia centuriata*. In the military sphere, however, the troop no longer retained its identity; but the whole body was divided into twenty *turmae*, each composed of three *decuries* commanded by *decurions*.² When with the institution of the republic the phalanx was split into two legions, ten *turmae* of cavalry were assigned to each legion.³ As in historical time the number of horsemen to a legion did not exceed 300,⁴ and as we have no reason to sup-

¹ This distinction of rank among the patrician centuries of the *comitia centuriata* is proved by the expression "*proceres patricii*" in the *Censoriae Tabulae*, quoted by Fest. 249. 1: "*Procum patricium in descriptione classium, quam fecit Ser. Tullius, significat procerum. I enim sunt principes;*" Cic. *Orat.* 46. 156: "*Centuriam fabrum et procum, ut censoriae tabulae loquuntur, audeo dicere, non fabrorum aut procorum.*" Mommsen, *Röm. Staatsr.* iii. 109, n. 1, has rightly referred it to one of the *sex suffragia*, for no century outside this group could have been so designated; cf. Livy ii. 20. 11, who speaks of the cavalry as *proceres iuventutis*. The mention of a century of leading patricians implies the existence of one or more centuries of the less distinguished members of the same rank, which must have been the rest of the *sex suffragia*. The superior rank of the *equites* in early Rome is proved by Dion. Hal. ii. 13. 1; iv. 18. 1; Livy i. 43. 8 f.; ii. 20. 11. In ii. 24. 2 Livy implies that the patricians did not serve on foot (*militare*), and in iii. 27. 1 he speaks of a patrician who, as an exception among his rank, served on foot because of his poverty. In ii. 42 f. he distinguishes the cavalry from the infantry as patricians from plebeians. The fact that in the political conflict between the two social classes the patricians often threatened to carry on foreign wars with the aid merely of their clients (cf. Dion. Hal. x. 15, 27 f., 43) proves that the phalanx was essentially plebeian. On the honorable place of the *equites* in the camp, see Nitzsch, in *Hist. Zeitschr.* vii (1862). 145. That the *sex suffragia* remained patrician down to the reform of the *comitia centuriata* is probable; cf. Sallust, *Hist.* i. 11, who represents the struggle between the social classes as continuing to the opening of the war with Hannibal; see also Mommsen, *Röm. Staatsr.* iii. 254.

² Dion. Hal. ii. 7. 4; cf. Polyb. vi. 25. 1; Varro, *L. L.* v. 91: "*Turma terima (e in u abiit) quod ter deni equites ex tribus tribubus Titienisum Ramnium Lucerum fiebant: itaque primi singularum decuriones dicti, qui ab eo in singulis turmis sunt etiamnunc terni;*" cf. Curiatius, in Fest. 355. 6. ³ Cf. Polyb. vi. 25. 1.

⁴ Three hundred is given as normal by Polyb. i. 16. 2; vi. 20. 9. In iii. 107. 10 f. he states it at 200, increased to 300 when to meet extraordinary cases the legion was strengthened to 5000; cf. ii. 24. 3. Livy, xxii. 36. 3, agrees with the latter statement. Mommsen, *Röm. Staatsr.* iii. 477, believes that the normal number was 300, decreased to 200 when a greater number of legions was levied.

pose that at an earlier period this arm of the service was proportionally stronger, we may conclude that in the Servian phalanx, or double legion, the number did not exceed 600.

From the foregoing discussion it appears clear that the Servian military system rested upon a division of the citizens into four groups, closely corresponding to the Athenian census divisions: (1) the equites priores, like the pentacosimedimni, (2) the equites posteriores, like the hippeis,¹ (3) the classis, like the zeugitae, (4) the light troops infra classem, like the thetes. The distinction between priores and posteriores rested not upon an assessment but upon a less precise difference in wealth, whether determined by the individual concerned or by the state we cannot know; it represented, too, a gradation of nobility. The distinction between the knights and the classici was one of rank; that between the classis and the soldiers infra classem was alone determined by the census.

III. *The Development of the Five Post-Servian Military Divisions on the Basis of Census Ratings*

This arrangement was by no means final. Further changes were made in both foot and horse which were to have a bearing on the organization of the comitia centuriata. After a time² two additions of men less heavily armed than the classici were made to the phalanx, whether simultaneously or successively cannot be determined. There were now forty centuries of classici, and the additions comprised ten centuries each, the second less heavily armed than the first, though they may both be considered heavy in contrast with the light troops. Perhaps the state according to its ability made up the deficiency in the equipment, so as to render the entire phalanx as evenly armed as possible.³ It numbered sixty centuries of heavy infantry,

¹ Niese, *Hist. Zeitschr.* xcvi (1907). 283, rightly assumes that the first and second classes at Athens were not cavalry; Helbig is right in understanding them to be mounted hoplites. Niese's criticism (*ibid.* 287 and n. 1) of Helbig's view is not convincing.

² Considerable time was required for the establishment of the earliest known meaning of classis before the second and third divisions were added.

³ This is a conjecture of Bruncke, in *Philol.* xl (1881). 362, favored by Delbrück, *Gesch. d. Kriegsk.* i. 222.

composed of three grades which depended upon the census rating.¹ The light troops were also grouped in two divisions on the same principle. The first comprised ten centuries; originally the second may have contained the same number, in which case four were afterward added to make the fourteen known to exist in the fully developed system.² There were five divisions of infantry amounting to eighty-four centuries of a hundred men each. Undoubtedly the growth of the army to this degree of strength was gradual, though the successive steps cannot be more minutely traced.³

In making the levy the military tribunes selected the soldiers from the lists of tribesmen, taking one tribe after another as the lot determined.⁴ The early Romans must have striven to distribute the population as equally as possible among the tribes in order to render them approximately equal in capacity for military service. As long as this equality continued, the officials could constitute the army of an equal number of men from each tribe. These considerations explain the close relation in early time between the number of tribes and of centuries as well as the suggestions offered by our sources as to an early connection between the centuries and the tribes.⁵ While there were but twenty tribes we may suppose that the legion comprised but 4000 men, which was raised to 4200 when the twenty-first tribe was added. In this way can we account for the number of centuries to the legion. If but half the available military strength was required, the magistrates might draw by lot ten

¹ P. 79, 86.

² Usually scholars (cf. Domazewski, in Pauly-Wissowa, *Real-Encycl.* iii. 1953 f.; Delbrück, *Gesch. d. Kriegsk.* i. 227; Smith, *Röm. Timokr.* 39) assume fifteen centuries for the fifth rating, on the authority of Livy i. 43. 7; Dion. Hal. iv. 17. 2; vii. 59. 5. But our knowledge of the phalanx is only inference, which to be acceptable must have at least the merit of possibility. The number fifteen is wrong because it could not have been divided evenly between the two legions; and on the other hand it will be shown later (p. 208) that in all probability the fifteenth century was not military but was added in the make up of the comitia centuriata.

³ Müller, in *Philol.* xxxiv (1876). 129, is right in supposing that the legion was strengthened between the time of Servius and 387, but it was not in the way he assumes. The tradition of a legion (half phalanx) of 4000 men is preserved in Livy vi. 22. 8.

⁴ Polyb. vi. 20.

⁵ Cf. Smith, *Röm. Timokr.* 121 ff.

tribes from which to make the levy.¹ It was an easy matter as long as the heavy troops were limited to the *classis*;² but when two other ratings were added, and when meantime the tribes must have grown unlike in population, it became practically impossible to maintain for each rating a just proportion from the tribes;³ and perhaps this was the chief reason for the modification in the method of recruiting. When therefore the tribes were increased to twenty-five, and it was deemed inexpedient to make a corresponding enlargement of the legion,⁴ a new principle was adopted for the levy: after determining the ratio between the number of men needed and the whole number available, the officers drew from each tribe a number proportionate to its capacity.⁵ It would agree well with all the known facts to suppose that the addition of the second and third ratings, followed by a more thorough organization of the light troops, belongs to the early republic (509-387),⁶ when Rome needed all her strength in her life and death struggle with hostile neighbors. At the same time the purchase of armor and the increased burden of military duty would help account

¹ Livy iv. 46. 1: "Dilectum haberi non ex toto passim populo placuit: decem tribus sorte ductae sunt. Ex his scriptos iuniores duo tribuni ad bellum duxere." If this passage does not state a historical fact, at least it gives the idea of the writer as to the custom of earlier time.

² P. 72, 76.

³ Cf. Smith, *Röm. Timokr.* 51 ff.

⁴ In time of especial danger, however, the legion was increased to five thousand; Polyb. vi. 20. 8.

⁵ Cf. Mommsen, *Röm. Staatsr.* iii. 268, n. 2.

⁶ That the phalanx was a comparatively late institution at Rome, or that it was slow in becoming the only military system, is indicated by the survival in tradition of a more primitive mode of warfare. Sometimes in the early republic a single gens with its clients took the field; for the Fabian gens, see Livy ii. 48 ff. Often the patricians threatened to arm their clients, to carry on a war without the aid of the troublesome plebeians; cf. Dion. Hal. x. 15, 27 f., 43. As there was no motive in later time for the invention of such stories, they must contain a kernel of real tradition; hence they could not go back to the sixth century, and it is difficult to believe that they are so old as the fifth.

Collateral evidence that the second and third divisions were instituted relatively late may be found in the circumstance that the scutum, the distinctive piece of armor of these divisions, was introduced no earlier than the age of Camillus — the period of the war with Veii and the Gallic conflagration; Livy viii. 8. 3; Müller-Deecke, *Etrusker*, i. 366. It was Samnite (Athen. vi. 106, p. 273 f.; cf. Sall. *Cat.* 51), and was therefore probably adopted in the fourth century when Rome first came into contact with that people.

for the desperate economic condition of the poorer peasants of that epoch.

The proportions of the five ratings — 20-15-10-5-2½ or 2 — to be discussed hereafter,¹ suggest an explanation of their origin. It would be reasonable to assume that the normal holding of the well-to-do citizen was a twenty-iugera lot and that the Servian phalanx was composed of possessors of that amount, the light-armed being their sons and others distinctly inferior in wealth. In course of a few generations as the population grew, with no corresponding territorial expansion or colonization or industrial development, and with only a limited conversion of waste to arable land, many of the lots became divided and subdivided. The result was a weakening of the phalanx at a time when the state was in the most pressing need of military resources. The institution of the five ratings as a basis for the reorganization of the army was a temporary expedient for meeting the crisis, to be superseded not long afterward by a better system founded on military pay. In all probability the introduction of the five ratings, or at least the beginning of the movement in that direction, should be closely connected with the institution of the censorship in 443 or 435.² The supposition would give us a sufficient reason for the creation of this new office at that time, and the strengthening of the army would explain the success of the Romans in the wars immediately following.

How the five ratings were arrayed in battle is unknown. If the front counted a thousand men (*milites*),³ the *classis* comprised four ranks (4000), the second and third ratings one rank each, making in all six ranks of heavy troops (6000).⁴ Twenty centuries could be drawn from the two ratings of light troops to complete the eight ranks when needed.⁵ But the Romans

¹ It is evident to the reader that these proportions are those of the *discriptio centuriarum* of Livy and Dionysius (p. 66 above), and it will be made clear below (p. 86) that the ratings were originally in terms of iugera, the minima of the five ratings being in all probability 20, 15, 10, 5, and 2½ or 2 iugera respectively.

² For the date, see Mommsen, *Röm. Staatsr.* ii. 334 f.; Kubitschek, in Pauly-Wissowa, *Real-Encycl.* iii. 1902 f.; Pais, *Storia di Roma*, I. ii. 13, 33 f.

³ There may be some truth in the etymology suggested by Varro, *L. L.* v. 89; cf. Soltau, *Altröm. Volksversamml.* 256. ⁴ Cf. Liers, *Kriegsw. d. Alten*, 46.

⁵ Dionysius Hal. iv. 17. 1, includes the fourth rating in the phalanx of heavy infantry. For other possibilities of arrangement, see Smith, *Röm. Timokr.* 46 f.

undoubtedly exercised the same good judgment as the Lacedaemonians in varying their formation to suit the emergency;¹ and for that reason it is wrong to assume the same depth for all occasions or an even depth for any one occasion. The management of long lines one-man deep must have been extremely difficult, if not impossible.² The explanation already suggested, that the state supplied the deficiency in equipment,³ would greatly simplify the case, for there would then exist no need of arraying the census groups in successive lines. Whatever may have been the tactic arrangement, it did not continue long, for soon after the introduction of regular pay, about 400 B.C.,⁴ the distinction between the ratings ceased to have an importance for military affairs.

IV. *The Question as to the Connection of the Supernumeraries and the Seniors with the Military Centuries*

A number of supernumeraries termed *accensi velati* accompanied the army. The epithet *accensi* proves them to have been outside the five ratings, while *velati* describes them as wearing civilian dress. We are informed by the sources that they carried water and weapons to the fighting men, stepped into the places of the dead and wounded, and acted as servants to the lower officers.⁵ These men could not have been organized in centuries,⁶ for they were drawn up in the rear behind

¹ Thuc. v. 68; p. 86 above.

² Delbrück, *Gesch. d. Kriegsk.* i. 229; Smith, *Rom. Timokr.* 45 ff. That the second and third divisions of the phalanx were sometimes withdrawn to operate on the flanks (Soltau, *Altröm. Volksversamml.* 249) is possible, though we have no proof of it.

³ P. 76. From early times the Greek and Italian states kept arsenals with which to arm the poor in crises; Liers, *Kriegsw. d. Alten*, 36 f. ⁴ P. 84.

⁵ Fest. ep. 14, 18, 369; Varro, *L. L.* vii. 56–58. From them the centuries and decurions engaged their servants; Cato, in Varro, *L. L.* vii. 58; Varro, *Vit. pop. rom.* iii, in Non. Marc. 520; Veget. ii. 19. Hence they served the civil magistrates as attendants; cf. *Censoriae Tabulae*, in Varro, *L. L.* vi. 88; Livy iii. 33. 8; Suet. *Caes.* 20; Non. Marc. 59. They must have corresponded with the squires of the Greek and Roman cavalry; p. 73. They were sometimes called *adscriptivi*, or as carriers *ferentarii*. If, as has been suggested, the secretaries and other attendants of the higher officers were also drawn from them, this circumstance would help explain the honor attaching to the collegium *accensorum velatorum* of imperial time; Mommsen, *Röm. Staatsr.* iii. 289; Delbrück, *Gesch. d. Kriegsk.* i. 233.

⁶ Notwithstanding Kubitschek, in Pauly-Wissowa, *Real-Encycl.* i. 135 f.

the light troops; they extended along the entire breadth of the army,¹ and must have greatly exceeded one hundred or even two hundred. The musicians,² too, who accompanied the army were not grouped in two centuries, for they were distributed throughout the army.³ There is no reason for assuming exactly two hundred musicians⁴ or exactly two hundred workmen,⁵ or for supposing that any of the men of this description were organized in centuries in the army. Reasoning in a similar way in regard to the seniors, we conclude that their organization in centuries could not have belonged to the original Servian system. A military century, as the name indicates, must have contained a hundred men.⁶ But in any static population there are three times as many men between seventeen and forty-six as between forty-six and sixty⁷—in Rome there were three times as many juniors as seniors; and as the number of junior and senior centuries was equal, the latter could have contained only about thirty-three each, on the supposition that the whole male population between seventeen and forty-six years was organized in centuries.

The mere fact that the senior century contained so few men suggests that it was not a military institution. This impression is confirmed by the information that the seniors were reserved for the defence of the city, while the juniors took the field in

¹ Livy viii. 8. 8. Leinveber, in *Philol.* N. F. xv (1902). 36, estimates 558 accensi to the legion.

² The cornicines tubicinesque; Livy i. 43. 7.

³ The cornicines marched in front of the banners; Joseph. *Bell. Jud.* v. 48; Fiebiger, in Pauly-Wissowa, *Real-Encycl.* iv. 1602.

⁴ The number is unknown. In the legio III Augusta there were thirty-six cornicines; *CIL.* vii. 2557; Fiebiger, *ibid.* 1603.

⁵ Livy i. 43. 3.

⁶ Varro, *L. L.* v. 88: "Centuria qui sub uno centurione sunt, quorum centenarius iustus numerus;" Fest, ep. 53: "Centuria . . . significat . . . in re militari centum homines;" Isid. *Etym.* ix. 3. 48; cf. Huschke, *Verf. d. Serv.* 107.

⁷ Estimates have been made by Müller, in *Philol.* xxxiv (1876). 127; Delbrück, *Gesch. d. Kriegsk.* i. 224; Beloch, *Bevölk. d. griech.-röm. Welt*, 42 f.; Smith, *Röm. Timokr.* 67. In the United States the ratio is more than four to one; *Special Reports: Suppl. Analysis and Derivative Tables, Twelfth Census of the United States*, 1900, Washington, 1906. p. 170 f. The estimate given in the text is based upon the "Deutsche Sterbetafel" for men, in E. Czuber, *Warscheinlichkeitsrechnung* (Leipzig, 1903), p. 572, 574. The ratio is almost exactly three.

active service.¹ When we reflect that even in the early republic the seniors could not often have been called on for defence, as the juniors were ordinarily sufficient for the purpose,² that the manning of the walls did not necessarily require a division into companies or an equipment like that for field service, and that when it was thought expedient for the seniors to serve in centuries or cohorts, their enrolment in these companies is especially mentioned, our conviction that the senior centuries did not belong to the original Servian organization grows into a certainty.³

V. *Conclusions as to the Servian and Early Republican Organizations ; Transition to the Manipular Legion*

In our search for the Servian and post-Servian schemes of military organization we found it necessary to eliminate from the *discriptio centuriarum* all the centuries of *pedites* with the exception of the juniors. But even a military century of juniors could not have remained identical with a voting century; for the

¹ Livy i. 43. 2. For the year 401, see Livy v. 10. 4: "Nec iuniores modo conscripti, sed seniores etiam coacti nomina dare, ut urbis custodiam agerent;" for 389, vi. 2. 6; for 386, vi. 6. 14; for 296, x. 21. 4: "Nec ingenui modo aut iuniores sacramento adacti, sed seniorum etiam cohortes factae libertinique centuriati. Et defendendae urbis consilia agitabantur;" cf. Mommsen, *Röm. Staatsr.* ii. 409, n. 5. The last of the definite instances here mentioned could alone be historical, and in this case not *centuriae* or *legiones* but *cohortes seniorum* are spoken of.

² Cf. Delbrück, *Gesch. d. Kriegsk.* i. 227 f.

³ If the senior centuries were formed in the way assumed by Mommsen, *Röm. Staatsr.* iii. 261 ("Nicht selbständig gebildet worden, sondern daraus hervorgegangen, dass wer aus einer Centurie des ersten Aufgebots Alters halber ausschied, damit in die entsprechende Centurie des zweiten Aufgebots eintrat"), about a half generation must have been required to evolve them. An objection to his idea is that the military centuries as well as the legions were formed anew at each year's levy (Polyb. vi. 20, 24), whereas the political centuries were made up by the censors (cf. Cic. *Rep.* ii. 22. 40: "In una centuria censebantur"), doubtless modified annually by the consuls. A military century and a political century accordingly could not have been composed of the same men.

The *Tabulae Iuniorum* contained the names of all juniors in honorable service in the field; Livy xxiv. 18. 7. *Tabulae Seniorum* are not mentioned. *Classis Iuniorum* (Fest. 246. 30) may apply to all eighty-five (or eighty-four) centuries of juniors, as Lange, *Röm. All.* i. 474, supposes, or to the first class; Tubero, *Historiae*, i, in Gell. x. 28. 1: "Scripsit Servium Tullium regem, populi Romani cum illas quinque classes iuniorum census faciendi gratia institueret." It is doubtful whether there was a separate list of seniors.

former comprised a fixed number and the same for all ratings, whereas in the comitia of historical time the centuries varied greatly in size, many of them containing far more than a hundred men each. In the four lower classes each century contained as many men as the entire first class;¹ and individuals constantly shifted from one class to another as their several properties increased or diminished.² It is a mistake, therefore, to think of the army as identical with even the junior centuries of the comitia.³ Doubtless when the Servian army was first introduced, its organization was made to fit actual conditions, so that all who were liable to service found their place in it; but as the political assembly of centuries was instituted many years afterward, the army with its various enlargements could have kept meanwhile no more than approximate pace with the changing population, and at no time could it include the physically disqualified, who nevertheless had a right to vote in the junior centuries of the political assembly. On the other hand there were soldiers in the army too young to be in the comitia centuriata.⁴

The conclusion as to the strength of the army in the first years of the republic, before the latter had acquired any considerable accession of territory, corresponds closely with a moderate estimate of the population under the conditions then existing. The area of the state was about 983 square kilometers (equivalent to 379.5 sq. mi. or 242,899 acres).⁵ Estimating the population of this agricultural community at its maximum of sixty to the square kilometer, we should have less than 60,000 for the entire area.⁶ The number of men from seventeen

¹ Cic. *Rep.* ii. 22. 40: "Illarum autem sex et nonaginta centuriarum in una centuria tum quidem plures censebantur quam paene in prima classe tota."

² Soltau, *Altröm. Volksversamml.* 240.

³ The confusion of the comitia with the army, which the ancient writers began, the moderns have intensified till the subject has become utterly incomprehensible. Chiefly to Genz, *Servianische Centurienverfassung* (1874) and Soltau, *Altröm. Volksversammlungen* (1880) belongs the credit of putting in a clear light the fact that the original Servian organization was an army. Both authors, however, have made the fundamental mistake of supposing that for a time during the early republic the army officiated as an assembly.

⁴ Livy xxiv. 8. 19.

⁵ After the inclusion of the Tribus Clustumina; Beloch, *Ital. Bund*, 74; Smith, *Röm. Timokr.* 58, n. 1.

⁶ Delbrück, *Gesch. d. Kriegsk.* i. 223 f.; Smith, *Röm. Timokr.* 58.

to sixty, the Roman military age, should be about thirty per cent of the population¹—less therefore than 18,000. If the ratio of juniors to seniors was about three to one,² we should have about 13,000 juniors to 5000 seniors. But a deduction must be made for slaves and for the physically incapacitated, leaving perhaps 9000 or 10,000 juniors and 3000 or 4000 seniors. These results are not unreasonable. Making allowance for several hundred supernumeraries,³ we should then have no more than enough juniors to fill the eighty-four centuries of foot and the six troops of horse. It is clear, therefore, that all available forces were included in the army and that the junior centuries could not have contained more than a hundred men each.

Even before the phalanx had thus been brought to perfection, modifications were being made in the equipment under the influence of the Gallic invasion.⁴ The introduction of pay, about 400 B.C., as has been said,⁵ broke down the distinction of equipment based on degree of wealth, and not long afterward, probably in the time of the Samnite wars, the phalanx gave way to the manipular legion, which reached its full development in the Punic wars.⁶

VI. *The Five Classes and their Ratings*

Though originally denoting the men of the first rating, who possessed the fullest equipment,⁷ the term *classis* with an explanatory adjective came to apply to the entire army⁸ or to its component parts.⁹ The plural "classes" came finally to mean the five census groups, represented by the five timocratic gradations of the *comitia centuriata*. What had formerly been the *classis* then came to be known as *classis prima*, and the "infra classem" ratings were numbered downward second, third,

¹ Beloch, *Bevölk. d. griech.-röm. Welt*, 53; Meyer, *Forsch. z. alt. Gesch.* ii. 162, n. 3; Delbrück, *ibid.* i. 14. Ferrero's estimate (*Greatness and Decline of Rome*, i. 1) of a total population of 150,000 seems to be too large.

² P. 81.

³ Cf. Liers, *Kriegsw. d. Alten*, 10.

⁴ Ascribed to Camillus; Plut. *Cam.* 40; cf. Fröhlich, *Gesch. d. Kriegsführung und Kriegskunst der Römer zur Zeit der Rep.*; Schiller, *Röm. Alt.* 708.

⁵ P. 80; cf. 63.

⁶ Fröhlich, *ibid.* 21 f.; Schiller, *ibid.*

⁷ P. 76.

⁸ Fest. 189. 13; ep. 56, 225; Fabius Pictor, *Annales*, i, in Gell. x. 15. 3 f.

⁹ Gell. i. 11. 3; Vergil, *Aen.* vii. 716: "Hortinae classes."

fourth, and fifth. Probably this extension in the use of the word was not made till after the disappearance of the ratings from the army — how much later we do not know. In a speech delivered in 169 in favor of the *lex Voconia* the elder Cato more than once examined into the meaning of *classicus* and *infra classem*.¹ A hasty inference would be that at this late date *classis* was still strictly limited to the first rating. It is to be noted, however, that the early meaning might be retained in a legal formula long after it had disappeared from general use, that *classicus* certainly preserved its original meaning notwithstanding the new development of the noun from which it is derived, and especially that the early sense of the terms *classicus* and *infra classem* was not generally known in 169, else Cato would not have taken such pains to define them. We know that the ratings were termed *classes* in 111,² and from what has just been said on the Voconian law it seems probable that the development took place long before 169. The circumstance that in their "*discriptio centuriarum*" Livy and Dionysius make no reference to the distinction between *classis* and *infra classem* would favor the supposition that they found no such distinction in their common source — ultimately Fabius Pictor. Hence it is not unlikely that *classis* was used in its historical meaning of property class in the censorial document from which Fabius derived his knowledge of the fully developed *comitia centuriata*, and which belonged to the period immediately following 269.³

¹ Gell. vi (vii). 13. 3: "In M. Catonis oratione, qua Voconiam legem suasit, quaeri solet, quid sit *classicus*, quid *infra classem*;" p. 90 below.

² *CIL*. i. 200 (*Lex Agr.*). 37: ("Recuperatores ex ci)vibus L. quei *classis primae* sient, XI dato."

³ P. 66 f.; cf. Fest. 249. 1: "In descriptione *classium* quam fecit Ser. Tullius." The attempt of Smith, *Röm. Timokr.*, especially 140 ff., to prove that the five classes were introduced by the censors of 179 has nothing in its favor. It rests upon Livy xl. 51. 9: "Mutarunt suffragia, regionatimque generibus hominum causisque et quaestibus tribus descripserunt." This passage makes no reference to the classes. In "generibus hominum" are included chiefly the "genus ingenuum" and the "genus libertinum." "Causis" applies to those conditions of the libertini, such as the possession of children of a definite age, which might serve as a ground for enrolment in a rural tribe; and "quaestibus" refers to the distinction between landowners and the "opifices et sellularii" of the city. "They changed the arrangement for voting, and drew up the tribal lists on a local basis according to the social orders, the conditions, and the callings of men;" cf. Lange, *Röm. Alt.* ii. 265 f.; p. 354 f. below.

Before the censorship of Appius Claudius Caecus, 312, military service within the census ratings was based on the possession of land, and the gradations of equipment, while they lasted, must therefore have been determined by the size of the estate reckoned in iugera.¹ Huschke² rightly inferred that the number of iugera marking the lower limit of each division must have been proportioned to the later money ratings, and assumed accordingly 20, 15, 10, 5, 2½ or 2 iugera as the respective minimal holdings of the five divisions. Although absolute certainty is unattainable, most scholars accept his conclusions as probable.³ Before the change was made in the appraisements from amount of land to money, the census gradations ceased to serve a military purpose. In the further discussion of these groups reference is therefore solely to their political character, especially as expressed in the organization of the comitia centuriata. Till the time of Marius, however, the soldiers were ordinarily recruited from the classes—that is, from the citizens who possessed at least the qualification of the lowest group.⁴

The money ratings of 312 are not recorded; we know those only of the time following 269. The ratings of the earlier date must have been in the nominally libral asses then current. For a long time, probably down to 312, the *as* remained at eleven

Among the many objections to Smith's theory these two may be mentioned: if the classes were introduced at this late historical time, (1) they would not have been ascribed to Servius Tullius; (2) they would have been adapted to the economic conditions of the second century B.C., whereas in 179 they were largely outgrown by the depreciation of the standard of value, the increase in the cost of living, and the growth of enormous estates. The *Römische Timokratie* is ably written, but its main thesis—the institution of the classes in the second century B.C.—remains unproved.

¹ P. 64.

² *Verf. d. Serv.* 643 f. et passim. He made a mistake however in supposing that from the beginning land was valued in terms of money.

³ Mommsen, *Röm. Trib.* 111; *Röm. Staatsr.* iii. 247 ff.; Kübler, in Pauly-Wissowa, *Real-Encycl.* iii. 2631. When the change was made from a land to a money rating, the land of the fifth class was appraised relatively higher than that of the others. Neumann, *Grundherrschaft d. röm. Rep.* 9 f., prefers to assume 16 (= 2 + 14) iugera for the highest class in order to explain the often mentioned estates of seven and fourteen iugera. But it is difficult to work out a consistent scheme on this basis. Smith, *Röm. Timokr.* 78 ff. et passim, strongly objects to the view in any form, as he doubts the existence of the Servian classes. In general he has greatly exaggerated the difficulties of their administration.

⁴ Sall. *Jug.* 86; Gell. xvi. 10. 14, 16; cf. Cass. Hem. 21 (Peter, *Reliquiae*, i. 102 f.).

to nine ounces in weight, then sank rapidly to four, three, and two ounces, reaching the last-mentioned weight in or shortly before 269. In this year or the following was legally adopted the lighter *as*, weighing two ounces, or a sixth of a pound, and hence termed sextantarian, and the heavier asses still in circulation were henceforth reckoned as sesterces, which now became the unit of value.¹ Two and a half sextantarian asses made a sesterce, and four sesterces made a denarius.² The *as* continued to be copper, whereas the sesterce and the denarius were silver. In consequence of the use of the sextantarian *as* the ratings must have been elevated to correspond with the decline of the standard; and the result of this change is the well-known series, 100,000, 75,000, 50,000, 25,000, 11,000.³ There can be no doubt that under the standard used in 312 the ratings were lower than those given. It is incredible that the classis should ever have been appraised so high as 100,000 asses of ten-ounce weight or even of the value of sesterces (5 oz.).⁴ But the ratings of 312 have not been definitely ascertained. Assuming but one elevation between the two dates and in the proportion of 4:10:: sextantarian *as*: heavy *as* or sesterce, Mommsen⁵

¹ Haeberlin, in *Riv. ital. numis.* xix (1906). 614 f.

² Samwer-Bahrdfeldt, *Gesch. d. alt. röm. Münzw.* 176 f.; Hill, *Greek and Roman Coins*, 47, 49, n. 1; Kubitschek, in Pauly-Wissowa, *Real-Encycl.* ii. 1509 ff.; Hultsch, *ibid.* v. 206; Regling, in *Klio*, vi (1906). 503. Babelon, *Trait. d. mon. Grecq. et Rom.* i. 595, still holds the view that the triental *as* was introduced in 269; cf. his *Orig. d. la mon.* 376; *Mon. d. la rép. Rom.* i. 37. ³ P. 66 f.

⁴ As silver is at present worth 51½ cents an ounce (so quoted in New York, Sept. 5, 1908), a denarius (= 7½ lb. Troy) of the coinage preceding 217 is worth by weight today 8½ cents. A more just comparison would be based on the present coined values. As a dollar contains 371½ grains of silver, a denarius would be worth 21½ cents; or with a liberal allowance for the alloy, we might say about 20 cents. The sesterce, ¼ denarius, would therefore be equivalent to five cents. An estate of 100,000 asses of heavy weight (sesterces) would be worth about \$5000, of the sextantarian standard \$2000. It is hardly possible that so large a proportion of the population as was contained in the first class should average the former amount of wealth to the family. In fact the purchasing power of money was enormously higher than these equivalents indicate. In 430 the value of an ox or cow was legally set at 100 libral asses and of a sheep at ten. Reckoning a beef at the low modern value of \$45, and a sheep at \$4.50, we obtain a value of 45 cents for the libral *as*, or 22½ cents for one of 5 oz. weight (sesterce), which would give the denarius a purchasing power of 90 cents.

⁵ *Röm. Staatsr.* iii. 249. In his *History* (Eng. ed. 1900), iii. 50, he expresses some doubt as to the numbers.

concludes that the appraisements of 312 were 40,000, 30,000, 20,000, 10,000, and 4400 asses respectively for the five classes. The adjustment however may have been gradual, as was the decline of the standard, and the former need not have corresponded exactly with the latter. But in so far as the Romans failed to bring about this adjustment, the censors must have found it necessary continually to advance the citizens from the lower to the higher divisions.

The ratings mentioned above as established on the basis of the sextantarian standard, namely 100,000, 75,000, 50,000, 25,000, and 11,000 asses for the five classes respectively, are those given by Livy.¹ Several variations affecting the highest and lowest classes are offered by other writers. Dionysius² states the appraisement of the fifth class at 12½ minae, which would be 12,500 asses. The usual explanation is that he is dealing in round numbers without especial regard to accuracy, for which reason Livy should be given the preference. It is doubtful however whether Dionysius was so inexact. More probably his estimate depended ultimately on the idea that the minimal number of iugera of the highest class was twenty-five,³ taken in connection with the decimal ratio between the extreme classes — an interpretation which would help explain variations in the rating of the highest class to be mentioned hereafter; or with less reason we might assume that the statements of Dionysius and Livy represent earlier and later conditions.⁴ The limit of 400 drachmas given by Polybius⁵ proves a lowering of the minimal rating between 269 and the publication of his history.⁶ It may have been made in 217, when the money system was again changed. As Polybius probably considered the drachma, or denarius, to be worth ten asses,⁷ the limit which he mentions

¹ I. 43; cf. p. 66.

² IV. 17. 2.

³ Plut. *Popl.* 21.

⁴ The view of Goguet, *Centuries*, 29 (following Niebuhr), that Livy has made a mistake, is not so likely.

⁵ VI. 19. 2: (All must serve in war) πλὴν τῶν ὑπὸ τὰς τετρακοσίας δραχμὰς τετιμμένων· τοὺτους δὲ παρίσσι πάντας εἰς τὴν ναυτικὴν. That it was the minimal rating of the fifth class, and not a still lower rating for military use only, is proved by a statement of Sall. *Iug.* 86, that till the time of Marius the soldiers were drawn from the classes.

⁶ Cf. Mommsen, *Röm. Staatsr.* iii. 251.

⁷ Commercially the denarius was then, after 217, worth sixteen asses; Hultsch, in Pauly-Wissowa, *Real-Encycl.* v. 209.

would be 4000 asses. Cicero states the minimal limit at 1500 asses,¹ and a still lower sum of 375, mentioned by Gellius,² marked the line of division between the taxable proletarians and the *capite censi*, who were exempt from taxation. As the differentiation between the two groups last named must have been effected before 167, when the Romans were relieved of the *tributum*,³ the rating given by Cicero could not have been later than that vouched for by Polybius. The limit of 4000 asses, accordingly, had reference merely to military service, whereas 1500 marked at once the political and tributary line of separation between the fifth class and the taxable proletarians.⁴ The limit of 375 asses, on the other hand, was far below the fifth class, and had nothing to do with it.⁵ The relation of these numbers to one another may be summarized as follows: Those assessed at 4000 or more asses belonged to the fifth class, enjoyed the political rights of that class, and were subject to military service as well as to taxation (*tributum*); those rated at 1500–4000 asses also belonged to the fifth class, enjoyed the political rights of that class, and were subject to taxation but exempt from military service; those rated at 375–1500 asses were proletarians, below the fifth class but subject to taxation; those rated below 375 asses, the *capite censi*, were exempt from taxation.

As regards the rating of the highest class, the elder Pliny⁶ states it at 110,000 asses, which may be a copyist's error for 100,000 or for 120,000; the estimate of Paulus Diaconus⁷ is 120,000 and of Gellius⁸ 125,000. If the manuscripts have correctly preserved these numbers, they may represent computations based on a varying number of iugera, from twenty-two to twenty-five⁹ at the rate of 5000 asses a iugerum — a valua-

¹ Cic. *Rep.* ii. 22. 40; Gell. xvi. 10. 10.

² XVI. 10. 10.

³ Cf. Kübler, in Pauly-Wissowa, *Real-Encycl.* iii. 1522.

⁴ This interpretation differs slightly from that of Mommsen, *Röm. Staatsr.* iii. 237.

⁵ In like manner those possessing above 100,000 asses were at times divided into groups for the distribution of military burdens according to wealth; cf. Livy xxiv. 11. 7–9. This too has no reference to the organization of the *comitia*.

⁶ *N. H.* xxxiii. 3. 43: "Maximus census CX assium fuit illo (Servio) rege, et ideo haec prima classis."

⁷ Fest. ep. 113.

⁸ VI (VII). 13.

⁹ Plut. *Popl.* 21; Huschke, *Verf. d. Serv.* 164.

tion which may have been given in the original annalistic source (Fabius Pictor). From the fact that Pliny assigns this rating to Servius as author, and that Gellius speaks of it in the past, we must infer that it was not due to a relatively late change. Indeed the rating must have remained unaltered to the time of Polybius,¹ who states that those appraised at 10,000 drachmas wore the cuirass — according to Livy² and Dionysius,³ the distinctive equipment of the first class.⁴ In the same age the Voconian law, 169, provided that a man registered by the censors as worth 100,000 asses or more should not bequeath his property to a woman.⁵ While speaking in favor of the measure the elder Cato expounded the distinction between the *classici* and those who were “*infra classem*.”⁶ Strictly following Cato's definition, Gellius⁷ explains the *classici* as those of the first class in contrast with the members of the lower classes, who are *infra classem*. Evidently the *classici* are to be identified with those rated at 100,000 asses, as given by Gaius.⁸ The sum of 100,000 sesterces, in place of asses, represented by later writers⁹ as the one fixed by this law, is due either to a late interpretation or to

¹ VI. 23. 15.

² I. 43. 2.

³ IV. 16. 2.

⁴ After the adoption of the *as* of an ounce weight in 217, sixteen asses of this standard were considered equivalent to a denarius or a drachma, which would give a rating of 160,000 asses for those who wore the cuirass. But the military pay was still reckoned at ten asses to the denarius (Pliny, *N. H.* xxxiii. 3. 45); the censors seem to have used the same ratio (Livy xxxix. 44. 2 f. compared with Plut. *Cat. Mai.* 18); and it is therefore highly probable that in this statement Polybius intended to express in drachmas the value of 100,000 asses. Taken in its entirety, the passage sufficiently proves that reference is to the highest class; the majority (*οἱ πολλοί*) of soldiers, he says, have breastplates, but those rated above 10,000 drachmas wear cuirasses. If, as Belot, *Rév. écon. et mon.* 77 ff., imagines, the sum of 100,000 asses fell below the rating of the lowest class, there would hardly have been a soldier without the cuirass.

⁵ Gaius ii. 274. That registration was necessary is proved by Cic. *Verr.* II. i. 41. 104 ff. By the word “*censi*” Cicero does not mean to designate any group or division of citizens; he simply refers to the fact of registration. P. Annius Asellus, of whom he speaks, had not been registered, or in any case at that sum, and hence was not technically liable to the law; but the value of his estate could be ascertained by authority of a court of justice, according to Greenidge, *Leg. Proced.* 95 f. Mommsen held the opinion, on the contrary (*Abhdl. d. Akad. d. Wiss. zu Berlin*, 1863. 468 f.), that the *incensi* were absolutely free from the law.

⁶ P. 85 above.

⁷ VI (VII). 13. For his rating of 125,000 asses for the first class, see p. 89.

⁸ N. 5 above.

⁹ Dio Cass. lvi. 10. 2; Psued. Ascon. 188.

an amendment.¹ The minimal qualification of the first class must therefore have continued unchanged from 269 to the passing of the Voconian law, 169, and the composition of the *History* of Polybius.² From the latter event to the tribuneship of Tiberius Gracchus little time was left for an increase, which certainly the Gracchi and their successors would take no interest in bringing about. Further depreciation in the weight of the *as*, by the reduction to a half ounce through the Papirian law of 89,³ had no effect on the valuation, as the standard was the silver sesterce, the *as* having merely the fiduciary value of a quarter sesterce. Apart from the accounts of Livy and Dionysius already considered, no reference is made to the valuation of the intermediate classes, unless it be a passage in Livy⁴ to the effect that freedmen possessing country estates worth at least 30,000 sesterces were enrolled in the rural tribes by the censors of 169, which is interpreted by Mommsen⁵ to refer to the qualification of the second class. This is true if, as has been assumed above, the censors still reckoned two and a half asses to the sesterce.⁶

VII. Belot's Theory as to the Ratings

Notice must be taken of a theory proposed by Belot,⁷ that at the time of the First Punic War, owing to an economic revolution which enhanced prices, and to the decrease in the weight of the *as*, the five ratings as stated by Dionysius for the earlier period were multiplied by ten, giving for the future 1,000,000, 750,000, 500,000, 250,000, 125,000 asses for the five classes respectively.⁸ The theory is supported with remarkable learning and skill. There can be no doubt as to the lowering of the weight of the *as* or of the economic revolution which increased prices. Large valuations of estates such as he mentions are

¹ Cf. Mommsen, *Röm. Staatsr.* iii. 249, n. 4; Greenidge, *Leg. Procd.* 95.

² The part containing this reference was not essentially later than the enactment of the Voconian law (p. 361).

⁴ XLV. 15. 2.

⁵ *Röm. Staatsr.* iii. 249, n. 2.

³ P. 403.

⁶ P. 90, n. 4.

⁷ First offered in his *Histoire des chevaliers*, i (Paris, 1866), and afterward defended in his *Révolution économique et monétaire . . . à Rome* (1885).

⁸ Cf. *Rév. écon. et mon.* 82.

erty, the mass of people remained so poor that the state could not disturb the census ratings, however out of harmony with the new conditions they seem to have become. No suspicion should be thrown on the continuance of these small valuations by the circumstance that occasionally the state compelled the wealthy to contribute to the burden of war according to their ability, as in 214, and increased the penalties for the crimes and misdemeanors which the rich and powerful were wont to commit.¹

VIII. *The Post-Servian Equites*

The classes, as developed after Servius, have now been considered sufficiently for an appreciation of their relation to the *comitia centuriata*. It remains to discuss from the same point of view the post-Servian alterations in the equestrian organization.

In the earliest period when the warriors in general equipped themselves at their own expense,² the equites provided their own horses. But in time as the patricians ceased to be the only wealthy class in the community, and as they began to lose their political advantages, their duty of keeping one or two horses came to be felt as onerous, and some means of lightening it was sought for. The only private property which was free from the burden of supporting military service was that of widows and orphans. The government determined accordingly to levy a regular contribution on this class of estates in the interest of the equites. The eques was allowed ten thousand asses, or one thousand denarii (*aes equestre*), with which to purchase his horse or horses for the ten years of service and two thousand asses (*aes hordearium*) annually for maintenance.³ He was not paid the money in advance, but was given security for the required sums,⁴ which were gradually to be made good from the special kind of tax here described. When these equestrian funds were first granted cannot be absolutely determined. Cicero⁵ assigns their institution to Tarquinius Priscus, Livy⁶ to Servius, Plu-

¹ Similar conditions exist at present in America. The monstrous luxury of the few and the heavy fines recently imposed on the Standard Oil Company do not prove all Americans to be wealthy.

² P. 61 f.

³ Livy i. 43. 9; Cic. *Rep.* ii. 20. 36; Fest. ep. 81, 221; Gaius iv. 27.

⁴ Gaius iv. 27.

⁵ *Rep.* ii. 20. 36.

⁶ I. 43. 9.

tarch¹ to Camillus in the year of his censorship, 377. For obvious reasons the earlier dates are suspicious, whereas the last has the advantage of connecting the institution of these funds with the general movement for the public support of military service. When in the war with Veii regular military pay was introduced, the eques on account of his more burdensome duty, perhaps too because of his higher rank, was allowed three times the pay of the legionary.² It was afterward decided to deduct the *aes hordearium*, probably also the *aes equestre*, from his pay.³ Meanwhile as wars were waged on an ever increasing scale, the patricians, who were dwindling in number, could not furnish all the cavalry needed. This want was especially felt in the struggle with Veii, whereupon wealthy plebeian youths⁴ came forward and offered to serve with their own horses.⁵ This is the first known instance of voluntary equestrian duty, doubtless often repeated at crises during the remainder of the republican period. In the first case at least the state provided for the keep of the horses. The volunteers were of the same grade of wealth as the conscripts; they were held in equal honor,⁶ and most probably their years of voluntary service were counted in with their regular duty in making up the required number.⁷ Service *equo privato* could also be imposed as a punishment. The only known instance, however, was that required by the censors of 209 of the equites who had disgraced themselves at

¹ *Cam. 2.* This statement is valuable notwithstanding Kubitschek, in Pauly-Wissowa, *Real-Encycl.* i. 683.

² Payment is mentioned by Livy v. 7. 12 (403) but triple pay is first spoken of in ch. 12. 12 (400); cf. Polyb. vi. 39. 12; Fest. 234. 26.

³ Polyb. vi. 39. 15. The statement of Varro, *L. L.* viii. 71 ("Debet igitur dici . . . non equum publicum mille assarium esse, sed mille assariorum"), seems to signify that in practice the cost of a public horse meant a payment to the eques of a thousand asses a year; cf. Gerathewohl, *Die Reiter und die Rittercent.* 49 ff., whose interpretation is preferable to that of Mommsen, *Röm. Staatsr.* iii. 257, n. 5. The fact that the support of one knight was considered equal to that of three legionaries (Livy xxix. 15. 7) is further evidence that the triple pay covered the purchase and keep of the horse. Reference in Livy vii. 41. 8, may be to the sums (*aera*) for the purchase and keep of the horse; cf. Mommsen, *Röm. Staatsr.* iii. 257, n. 3.

⁴ Dionysius Hal. vi. 44. 2, assigns the first recruiting of the equites from the plebeians to the year 494, dating the event about a century too early; cf. Mommsen, *Röm. Staatsr.* iii. 478, n. 1.

⁵ Livy v. 7. 5.

⁶ All this may be gathered from Livy v. 7. 4-13; cf. Gerathewohl, *Die Reiter und die Rittercent.* 16 ff.

⁷ Polyb. vi. 19. 2; Livy xxvii. 11. 14.

Cannae. Their horses were taken from them, their campaigns equo publico were not counted to their credit, but they were required to serve ten years equis privatis.¹ These are the only instances of service with private horses mentioned in history. In all ancient literature is no suggestion that the equites equo privato formed a rank by themselves or were an institution.² It should also be said that the injustice of furnishing some with horses and of compelling others to go to war at their own expense, unless by way of punishment, was contrary to the spirit of the constitution. This conclusion is supported by the elder Pliny's³ definition of the military equites, which makes the public horse an essential. From the time therefore when the state began to support the mounted service in the way described above, the equites equis publicis continued to be the only regular citizen horsemen.

The number of equites with public horses is approximately determined for any time by the number of legions then enrolled. The Servian phalanx, as has been noted,⁴ consisted of two legions, which remained the normal number through the fifth century. But in the wars with Samnium and Pyrrhus Rome was able regularly to support four legions.⁵ The military force could not have been doubled before the incorporation of the Veientan territory early in the fourth century;⁶ most probably the enlargement belongs to still later time. The increase in the

¹ Livy xxvii. 11. 14, 16. This passage does not refer to those who avoided duty equo privato, as Mommsen, *Röm. Staatsr.* iii. 478, n. 2, supposes. Those were punished who were qualified to serve equo publico but had avoided military duty altogether. Gerathewohl, *ibid.* 20 f., believes that Livy has made a mistake in assigning this judgment to the censors of 209, as it would much better suit the conditions of 214.

² The credit of establishing this fact beyond a doubt is due to Gerathewohl, *Die Reiter und die Rittercent.* 14-34.

³ *N. H.* xxxiii. 1. 30: "Equitum nomen subsistebat in turmis equorum publicorum;" cf. Fest. ep. 81: "Equitare antiqui dicebant equum publicum merere."

⁴ P. 75.

⁵ There were four legions each with 4000 infantry and 300 horse at the opening of the First Punic War; Polyb. i. 16. 2. Four legions fought against Pyrrhus at Asculum, 279; Dion. Hal. xx. 1. This was the normal number for the Samnite wars; cf. Mommsen, *Röm. Staatsr.* iii. 477.

⁶ Two legions of juniors was the maximal limit of Rome's military strength during the period of twenty-one tribes; cf. p. 77, 84. The incorporation of the Veientan territory, 387, could not at once have doubled this force.

infantry required a corresponding enlargement of the mounted service. At least twelve hundred equites were henceforth required for active duty. Making allowance for reserves and ineffectives, the government raised the number of equites equo publico to eighteen hundred. The twelve new centuries were open alike to patricians and plebeians, whereas the old six remained for a time exclusively patrician. This seems to have been the condition at the opening of the first war with Carthage. During the Punic wars the number varied greatly, sometimes reaching a total of more than five thousand in the field, not counting reserves.¹ After the war with Hannibal the state, drained of men and money, allowed the cavalry to dwindle.² Viewing this condition with alarm, the elder Cato³ urged that the number should be increased, and that a minimal limit be fixed at 2200. Probably at the same time he proposed that the legion should be strengthened. His measure must have been adopted, for after his censorship we find the legion regularly consisting of 5200 foot and 300 horse.⁴ Under Augustus there were times when 5000 equites⁵ equo publico took part in the parade which he revived.⁶ As no reason can be found why Augustus should suddenly increase this class, we must conclude that there were probably about 5000 equites equo publico in the late republic.

As long as the cavalry remained exclusively patrician, a census qualification was precluded. Though Cicero and Livy refer the equestrian census to Servius Tullius, their vagueness

¹ Livy xxv. 3. 1-7; cf. Gerathewohl, *Die Reiter und die Rittercent.* 54. The sources do not suggest that the number after reaching eighteen hundred remained unalterable. In Cic. *Rep.* ii. 20. 36 ("Deinde equitum ad hunc morem constituit, qui usque adhuc est retentus") reference is not to number but to character; Gerathewohl, *ibid.* 8 f. Mommsen's interpretation (*Röm. Staatsr.* iii. 259, n. 5) is therefore wrong.

² In 200 the seven legions contained twenty-one hundred equites or fewer; Gerathewohl, *Die Reiter und die Rittercent.* 56.

³ *Orat.* lxiv: "Nunc ego arbitror oportere restitui (Mommsen's emendation 'institutui' is unnecessary), quin minus duobus milibus ac ducentis sit aerum equestrium." Mommsen, *Röm. Staatsr.* iii. 259, wrongly holds the opinion that the measure failed to pass.

⁴ See citations collected by Gerathewohl, *ibid.* 56, n. 1.

⁵ Dion. Hal. vi. 13. 4: "Ἐστὶν ὅτε shows that the number varied; cf. Madvig, *Röm. Staat.* i. 171.

⁶ Suet. *Aug.* 38.

on this point shows that they lacked definite information.¹ It must have been introduced at the time when the patriciate ceased to be an essential qualification, when the levy came to be made on the basis of wealth rather than of blood. This change should be assigned to the early part of the fourth century B.C.² For a time the census was that of the first class.³ In 214 it was still 100,000 asses, or not much above, as has already been proved.⁴ In the late republic and under the emperors the minimal rating was 400,000 sesterces.⁵ When it was raised to this amount is unknown.

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¹ Cic. *Rep.* ii. 22. 39; Livy i. 43. 8 f.; Dion. Hal. iv. 18. 1. High birth and great wealth are emphasized, but no definite rating of the class is given. Their treatment of the subject is compatible with the view that the knights were then patrician—a view however which these writers did not have clearly in mind. Livy's statement (iii. 27. 1) that a certain patrician served in the infantry because of his poverty harmonizes well with the same view; for as the *aes equestre* and *hordearium* were not yet introduced, a poor patrician would be unable to own and keep a horse. Those scholars therefore seem to be wrong who, like Grathewohl, *ibid.* 67, following Rubino, in *Zeitschr. f. d. Altertumswiss.* iv (1846). 219, refer the equestrian census to Servius Tullius.

² P. 94. It is for about this time (403) that Livy, v. 7. 5, first refers definitely to an equestrian census.

³ This fact is most clearly stated by Dion. Hal. vii. 59. 3, and is confirmed by Cic. *Rep.* ii. 22. 39.; cf. Pliny, *N. H.* xxxiii. 3. 43; for further evidence, see Belot, *Rév. écon. et mon.* 5 ff.

⁴ P. 92.

⁵ Hor. *Ep.* I. i. 57; Pliny, *N. H.* xxxiii. 2. 32; Mart. iv. 67; v. 23, 25, 38; Pliny, *Ep.* i. 19. 2; Juv. i. 105; v. 132; xiv. 326; Suet. *Caes.* 38.

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(idem); *Capite censi*, iii. 1521-3 (Kübler); *Census*, iii. 1914-24 (Kubitschek); *Centuria*, iii. 1952-62 (Kübler, Domazewski, Kubitschek); *Classis*, iii. 2630-32 (Kübler); *Collegium*, iv. 380-480 (Kornemann); *Comitia*, iv. 679-715 (Liebenam); *Cornicines*, iv. 1602 f. (Fiebigler); *Denarius*, v. 202-15 (Hultsch); articles in Daremberg et Saglio, *Dict.*: *Accensus*, i. 16 ff. (Humbert and others); *As*, i. 454-64 (Lenormant); *Census*, ii. 1003-17 (Humbert); *Centuria*, ii. 1017 (idem); *Classis*, i. 1224 f. (idem); *Comices centuriates*, s. *Comitia*, ii. 1378 ff. (idem); articles in Ruggiero, E., *Dizionario epigrafico*: *Accensus*, i. 18-21; *Aerarius*, i. 311-3; *Aes*, i. 313 f.; *Centuria*, ii. 183-9; *Censor*, ii. 157 ff.; *Census*, ii. 174-7; *Cornicines*, ii. 1213-6; *Fabri*, iii. 4-18 (Libenam); Olcott, *Thes. ling. lat. ep.* i. 51: *Accensus*; Pais, E., *Ancient Legends of Roman History*, ch. vii.

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CHAPTER V

THE AUSPICES

I. *Auspicia Privata*

AUSPICES (auspicia) were signs sent by the gods through which they declared their will to men. Those given in answer to prayer were impetrativa (or impetrata), those sent unasked oblativa. The first were necessarily favorable; the second might be either favorable or the contrary.¹ To take or to hold auspices was to seek such signs in due form. Auspicia, or the singular auspiciu, also designated the right or the power to perform the function. They were not a means of prophecy of future events but of ascertaining whether the deity approved a proposed action.² With reference to their object and to the persons qualified to take them, they were of two kinds, private and public. Whereas the public auspices, taken in behalf of the state, belonged exclusively to magistrates, the private were open to all;³ and in early times a Roman always resorted to them before beginning any important business.⁴ Though it was permissible to consult any deity,⁵ the greatest weight attached to the approval of the supreme god Jupiter.⁶

¹ Serv. in *Aen.* iii. 89; vi. 190; xii. 259.

² Cic. *Div.* 16. 29 f.: "Dirae, sicut cetera auspicia, ut omina, ut signa, non causas adferunt, cur quid eveniat, sed nuntiant eventura, nisi provideris." The last statement means only that a misfortune will happen, if an evil omen is unheeded. Cic. *Div.* ii. 33. 70: "Non enim sumus ii nos augures, qui . . . futura dicamus;" cf. Lange, *Röm. Alt.* i. 331; Aust, *Relig. d. Römer*, 198.

³ Serv. in *Aen.* iii. 20: "Auspiciari enim cuivis . . . licet."

⁴ Cic. *Div.* i. 16. 28: "Nihil fere quondam maioris rei nisi auspiciato ne privatim quidem gerebatur, quod etiam nunc nuptiarum auspices declarant, qui re omitta nomen tantum tenent;" 46. 104; Val. Max. ii. 1. 1. On the nuptial auspices, see De Marchi, *Cult. priv. di Rom.* i. 152-5.

⁵ Romulus consulted the rest of the gods along with Jupiter; Dion. Hal. ii. 5. 1.

⁶ The public auspices were Jupiter's alone; Cic. *Leg.* ii. 8. 20. So were the auspical chickens; *Div.* ii. 34. 72; 35. 73; cf. Mommsen, *Röm. Staatsr.* i. 77, n. 2. In historical time the sign called for was Jupiter's lightning; Cic. *Div.* ii. 18. 42;

The plebeians, who as long as they were excluded from the magistracies were necessarily debarred from the *auspicia publica*, enjoyed equally with the patricians all private rights of religion; in fact if the nobles had wished, they possessed no legal means of preventing the holding of auspices or the performance of any other sacred rite in private plebeian houses. Not only is it stated that all had a right to auspicate,¹ but the formula for summoning troops given by Cincius² implies that the soldiers, who were mainly plebeian, were accustomed to perform the rite. We find accordingly the elder Cato, a plebeian, attending to the ceremony in his own home.³ The patricians, however, who believed themselves to be nearer and dearer to the gods than were the plebeians, and who in their struggle to keep themselves a closed caste and the offices barred against the lower social class, declared that *conubium* if granted would disturb the private as well as public auspices.⁴ But this assertion need not signify that the plebeians had no private auspices, it might indicate merely a difference between the plebeian and patrician ceremonies, naturally implying the superiority of the latter. Again when on a certain occasion according to Livy a tribune of the plebs inquired of a patrician why a plebeian could not be made consul, the reply was that no plebeian had the auspices, reiterating that the *decemvirs* had forbidden *conubium* to prevent the disturbance of the ceremony by uncertainty of birth.⁵ Reference might here be simply to the *auspicia publica*, with which alone the consul was concerned. However this may be, the patrician claim was indignantly repudiated by the plebeians, and the historian can say no more than that it was "perhaps true." Another passage from Livy usually interpreted in support of the theory

Vatin. 8. 20; *Phil.* v. 3. 7. The epithet *Elicius*, notwithstanding Varro, *L. L.* vi. 95; Livy i. 20. 7; 31. 8, does not find its explanation in the auspices; Aust, in Roscher, *Lex. Myth.* ii. 656 ff.; Wissowa, *Relig. u. Kult. d. Röm.* 106.

¹ P. 100, n. 3.

² In Gell. xvi. 4. 4.

³ Cato, *De sacrilegio commisso*, in Fest. 234. 30. No one could imagine Attus Navius, the swineherd, to have been a patrician, and yet he was the most famous of private augurs; Cic. *Div.* i. 17. It is significant, too, that the great authority on private auspices, P. Nigidius Figulus, author of *Augurium privatum* in several books (Gell. vii. 6. 10), was a plebeian.

⁴ Livy iv. 2. 5 f.

⁵ Livy iv. 6. 1 f.

that the patricians alone had private auspices represents them, before the opening of the offices to the commons, as saying, "So peculiar to us are the auspices that not only the patrician magistrates whom the people choose are elected under the auspices, but we ourselves under the sanction of the same rite without a vote of the people appoint the interrex, and we as private persons hold auspices, which they do not hold even as magistrates."¹ This passage is perfectly intelligible to one who bears in mind that in the late republic private auspices had disappeared,² and that therefore when the word *auspicia* is used without qualification by a late republican or imperial writer, it always has reference to the public ceremonies.³ In the quotation just given, accordingly, nothing more is meant than that the patricians, who have the exclusive right to the offices, are alone competent to perform the public religious ceremonies which belong to the magistrates. Reference in the quotation to the auspices of private persons signifies that when there was no magistrate competent to hold the election of consuls, the public auspices returned to the senate, the patrician members of which proceeded under auspication to appoint an interrex for holding the elections. In this case the senatorial patricians, it was asserted, attended to the ceremony not as magistrates but as private persons, though the rites were themselves public. As distinguished from magistrates, the senators were *privati*. It was not, then, as mere citizens but as patrician members of the senate that they performed the rite. Further light is thrown on this subject by the fact that in the agitation for the opening of the augural and pontifical colleges to the plebeians in 300, the patricians repeated the assertion that with them alone were auspices, they alone had family (*gens*), they alone possessed true *imperium* and *auspicium* in peace and war.⁴ This claim they had the effrontery to make despite the fact that plebeian consuls had been taking public auspices for more than

¹ Livy vi. 41. 5 f.

² Cic. *Div.* ii. 36. 76: "Nos, nisi dum a populo auspicia accepta habemus, quam multum iis utimur?" i. 16. 28.

³ Rubino, *Röm. Verf.* 46, n. 2, has pointed out that the phrase *auspicia publica* occurs only in Livy iv. 2. 5, where he believes it to be used in a special sense. In the time of Cicero no one but an antiquarian ever thought of any other kind of auspices.

⁴ Livy x. 8. 9.

sixty years. In the pride of their blood they claimed that theirs alone were strictly legal (*iustum*). Notwithstanding such partisan assertions the facts thus far adduced lead unmistakably to the conclusion that the plebeians equally with the patricians enjoyed the right to private auspices.¹

II. *Auspicia Publica Impetrativa*

The right to public auspices belonged primarily to patrician magistracies²—those which in the early republic were filled only by patricians, but which continued to be called patrician after they were open to plebeians. All elections and appointments to such offices were auspicated;³ and their incumbents were expected to seek the previous approval of Jupiter for every important act of their administration.⁴ The king, interrex, dictator, consuls, praetors, and censors had the *auspicia maxima*; the others the *minora*.⁵ The praetor, as colleague of the consuls, was elected under the same auspices with them, that is, in the same meeting of the assembly, whereas the censors, not being colleagues of the consuls, were elected under different auspices. Between magistrates who were not colleagues there could be no collision in the *auspicia impetrativa*; those of the censors neither strengthened nor vitiated those of the consuls or praetors, nor were strengthened or vitiated by them. In case of a conflict between colleagues, the greater auspices annulled the lesser, and equal auspices annulled each other.⁶ For the exercise of a function properly belonging to a magistracy the incumbent per-

¹ The usual view, represented by Mommsen, *Röm. Staatsr.* i. 89, n. 1, is that the plebeians did not possess this right originally but acquired it later; cf. also Wissowa, in Pauly-Wissowa, *Real-Encycl.* ii. 2581; Di Marchi, *Cult. priv. di. Rom.* i. 233. This hypothesis not only lacks support, but is also vitiated by the fact that at the time of the supposed equalization private auspices must have been declining, as Cicero found them extinct.

The treatment of private auspices here given is supplementary to the study of the social classes made in ch. ii.

² Messala, in Gell. xiii. 15. 4; Fest. 157. 21; Rubino, *Röm. Verf.* 71 ff.; Bouché-Leclercq, in Daremberg et Saglio, *Dict.* i. 580.

³ Cic. *Leg.* iii. 3. 9; Livy vi. 41. 6; viii. 23. 15 f.

⁴ Mommsen, *Röm. Staatsr.* i. 96 ff.

⁵ Messala, *De auspiciis*, i, in Gell. xiii. 15. 4; Bouché-Leclercq, *ibid.* ii. 581.

⁶ Messala, *ibid.*

formed the ceremony at his own will and pleasure, unless expressly forbidden by a superior;¹ but one who undertook a deputed duty had to ask the auspiciu of a magistrate who was competent to perform the duty in his own right. Thus the quaestor, who was not qualified by right of his office to call the comitia centuriata, found it necessary to do so in his capital prosecutions. In such a case he asked of the praetor or consul the right to hold auspices for summoning this assembly.² Whether the pontifex maximus held auspices in his own name, or was obliged, like the quaestor, to apply for them to a higher secular official, is unknown; at all events it was necessary for him to auspicate the comitia calata, over which he presided.³ It seems probable that the tribunes originally did not have the right as they were not magistrates; but when they came to be so considered, they acquired the auspiciu. All magistrates—necessarily including the tribunes—who convoked the senate had previously to perform the ceremony;⁴ Cicero⁵ seems to include the tribunes among the magistrates who had the auspiciu; and as further proof the very expression “patriciorum (magistratuum) auspicia”⁶ used by Messala implies the existence of “plebeiorum magistratuum auspicia.” It was not the custom of the tribunes, however, to auspicate their assemblies of the plebs.⁷

¹ As when for instance the consul forbids the minor magistrate to “watch the sky” on an appointed comitial day; Gell. xiii. 15. 1: “In edicto consulum, quo edicunt, quis dies comitiis centuriatis futurus sit, scribitur ex vetere forma perpetua: ne quis magistratus minor de caelo servasse velit.”

² *Commentarium Aquisitionis* of a quaestor, in Varro, *L. L.* vi. 91: “Auspicio operam des et in templo auspices, dum aut ad praetorem aut ad consulem mittas auspiciu petitu.” This passage shows that the quaestor, though asking permission, himself holds the auspices.

³ The first alternative is held by Mommsen, *Röm. Staatsr.* i. 89, whereas Wissowa, in Pauly-Wissowa, *Real-Encycl.* ii. 2584, is inclined to the latter.

⁴ Gell. xiv. 7. 4, 8, quoting Varro.

⁵ *Leg.* iii. 3. 10: “Omnes magistratus auspiciu iudiciuque habento.” The previous paragraph is concerned with the tribunes, and in this citation the use of iudiciu instead of imperiu points to the tribunes. It is hardly possible that Cicero in his *Leges* would give the tribunes a right they did not possess.

⁶ In Gell. xiii. 15. 4. Wissowa, in Pauly-Wissowa, *Real-Encycl.* ii. 2583, seems therefore to be incorrect in excluding the tribunes from the right.

⁷ In stating that the tribunes were given the right to take auspices for their assemblies, Zonaras, vii. 19, evidently confuses the oblativa with the impetrativa. It is an

For assistance in auspication the magistrate summoned any person he pleased, who was rarely if ever a public augur.¹ An augur,² whether private or official, was a person who knew how to hold and to interpret auspices.³ A college of public augurs⁴ for the service of the state was established in the most primitive times. Probably comprising three members, one from each tribe, it was gradually increased till under Sulla it reached fifteen.⁵ The members of the college were neither

interesting fact that according to Cicero the first college of tribunes was elected under auspices in the comitia curiata; Frag. A. vii. 48: "Itaque auspiciato postero anno tr. pl. comitiis curiatis creati sunt."

¹ Cic. *Div.* ii. 34. 71: "Hic apud maiores nostros adhibebatur peritus, nunc quilibet." As in the time of Cicero auspices had come to be a mere pretence (p. 118), an attendant without skill or scruple would best serve the magistrate's purpose. In Livy iv. 18. 6, the augurs see the omen for the dictator, but some other attendant might serve the purpose. Being a paid functionary, the bird-seer mentioned by Dion. Hal. ii. 6. 2 as assisting in an auspication could not have been a public augur; Valeton, in *Mnemos.* xviii. 406 ff.; Wissowa, *Relig. u. Kult. d. Römer*, 456, n. 8. The magistrate requested assistance in the following form: "Q. Fabi, te mihi in auspicio esse volo;" and the reply was "Audiui;" Cic. *Div.* ii. 34. 71; cf. § 72. From this formula it appears that the person summoned did not hold, but assisted in, the auspices; Lange, *Röm. Alt.* i. 338. The auspices are always said to belong not to the augurs, but to the magistrates; Cic. *Leg.* iii. 3. 10; Messala, in Gell. xiii. 15. 4. Instead of remaining with the augurs in the city the auspices followed a duly elected consul into the field; Livy xxii. 1. 6. Auspicari is strictly a function of the magistrate (cf. Varro, *Rer. hum.* xx, in Non. Marc. 92) though the word is sometimes applied to the observation made by augurs (Fest. ep. 18), whose function is properly termed augurium, augurare; Aust, *Relig. d. Römer*, 200 f.; Wissowa, in Pauly-Wissowa, *Real-Encycl.* ii. 2580 f.

² The derivation is unknown. Wissowa, in Pauly-Wissowa, *Real-Encycl.* ii. 2313 f., summarizes the principal theories. Probability seems to favor the view that it is a combination of the root of avis with a verbal noun meaning "to see" or the like; Walde, *Lat. etym. Wörterb.* 55.

³ Attus Navius from his boyhood was renowned for his augural skill; Cic. *Div.* i. 17; Livy i. 36; Dion. Hal. iii. 70 f.; cf. Lange, *Röm. Alt.* i. 333. Romulus, too, is said to have been an excellent augur; Remus possessed similar skill (Cic. *Div.* i. 2. 3; 17. 30; 40. 89; Ennius, in Cic. *Div.* i. 48. 107), and in the opinion of Livy, i. 18. 6; iv. 4. 2, there was no augural college before Numa.

⁴ Varro, *L. L.* v. 33; Cic. *Fam.* vi. 6. 7; *Senec.* 18. 64; Fest. 161. 20; *CIL.* vi. 503, 504, 511, 1233, 1449; x. 211; Wissowa, in Pauly-Wissowa, *Real-Encycl.* ii. 2314.

⁵ Cic. *Rep.* ii. 9. 16; 14. 26; Livy x. 6. 7; ep. lxxxix; Marquardt, *Röm. Staatsv.* iii. 398; Lange, *Röm. Alt.* i. 334 f.; Wissowa, *Relig. u. Kult. d. Römer*, 451; also his article in Pauly-Wissowa, *Real-Encycl.* ii. 2316 f. In adding a supernumerary (Dio Cass. xlii. 51. 4) Caesar set an example extensively followed by the principes; cf. Dio Cass. li. 20. 3; Wissowa, *ibid.* ii. 2317.

magistrates¹ nor prophets. They were rather the wise,² experienced³ keepers and expounders of a sacred science and art⁴—the “interpreters of Jupiter All-Great and Good.”⁵ Having to do with religion, they were sacerdotes, like the pontiffs, though not offerers of sacrifice (flamines).⁶ The functions which they exercised independently of the magistrates included the inauguration of religious officials (inaugurare sacerdotes), the blessing of fields twice a year, and of the people after the close of a war.⁷ In attending to such duties (auguria) only did they exercise their right to the auspices.⁸ In a dependent though far more influential position they acted as the professionally skilled advisers and assistants of the magistrates in all matters of peace and war.⁹ If a magistrate was not himself an augur,¹⁰ it was of the utmost importance to have their service; for the science of discovering and interpreting the divine omens was intricate, mistakes were easy, and the slightest oversight might vitiate the whole business in hand. When in doubt as to the validity of the ceremony, either the magistrate to whom it belonged or the senate could refer the case to the college of augurs, which thereupon gave an opinion

¹ As distinguished from magistrates they were privati; Cic. *Div.* i. 40. 89.

² Auctor Incertus (Huschke) p. 4: “Collegium augurum ordo hominum prudentum erat, qui prodigiis publicis praeerant;” cf. Lange, *Röm. Alt.* i. 330.

³ Cic. *Div.* ii. 34. 71 f.; cf. Livy xli. 18.

⁴ Plut. *Q. R.* 99.

⁵ Cic. *Leg.* ii. 8. 20; *Phil.* xiii. 5. 12.

⁶ They are never called flamines, and no flamen was attached to their office; Wissowa, *Relig. u. Kult. d. Römer*, 451. The great sacerdotal colleges were more political than religious, and the college of augurs was the most thoroughly political of all; Bouché-Leclercq, in Daremberg et Saglio, *Dict.* i. 564.

⁷ Cic. *Leg.* ii. 8. 20; Dio Cass. xxxvii. 24 f.; Aust, *Relig. d. Römer*, 199; Wissowa, in Pauly-Wissowa, *Real-Encycl.* ii. 2325–30.

⁸ Fest. 333. 9: “Spectio in auguralibus ponitur pro aspersione; (data est) et nuntiatio, qui omne ius auspicio habent, auguribus non spectio dumtaxat, quorum consilio rem gerent magistratus, ut possent impedire, nuntiando quaecumque vidissent; privatis spectio sine nuntiatione data est, ut ipsi auspicio rem gererent, non ut alios impedirent nuntiando.” — Valeton’s emendation, in *Mnemos.* xviii (1890). 455 f.

⁹ Cic. *Leg.* ii. 8. 21: “Quique agent rem duelli quique domi popularem, auspiciu praemonito olliue obtemperanto;” cf. Lange, *Röm. Alt.* i. 332.

¹⁰ It generally happened that both the augural and pontifical colleges were filled by statesmen, so that Cicero could lay down the principle that the sacred and political offices were held by the same persons; *Div.* i. 40. 89; cf. Wissowa, in Pauly-Wissowa, *Real-Encycl.* ii. 2321.

in the form of a decree. The senate then acted on the matter according to its judgment.¹ In case a law had been passed, a magistrate elected, or any public act performed against its wishes, it could inquire of the college of augurs whether the election or other act had been duly auspicated; and should a defect be alleged, the senate could annul the act or request the magistrate to resign. It required unusual courage in a man to keep himself in office in defiance of the authority of the senate and of the religious feeling of the whole people.² These considerations account for the great importance attaching to the presence of augurs in the comitia — a subject to be treated in another connection.³

The service of augurs was most needed in establishing the terrestrial templum⁴ — a carefully marked out, oriented spot which the magistrate occupied while performing the rite.⁵ Whereas the commander of an army generally made use of chicken auspices (*signa ex tripudiis*), which did not require their assistance,⁶ they were doubtless always called upon to

¹ Livy iv. 7. 3; viii. 23. 14-17; xxiii. 31. 13; xlv. 12. 10; Cic. *Phil.* ii. 33. 83; *Leg.* ii. 12. 31; *N. D.* ii. 4. 11. A defect in the auspicia impetrativa was expressed by the formula "*vitio tabernaculum captum esse*" (Cic. *N. D.* ii. 4. 11; *Div.* i. 17. 33; Livy iv. 7. 3; Serv. *in Aen.* ii. 178), whereas the phrase "*vitio creatum esse*" or the like (Livy viii. 15. 6; 23. 14; xxiii. 31. 13; xlv. 12. 10; Plut. *Marcell.* 4) denoted a failure to take the auspices or to heed unfavorable omens; Wissowa, in Pauly-Wissowa, *Real-Encycl.* ii. 2334. On the annulment of laws through augural decrees, see Cic. *Leg.* 8. 21; 12. 31; *Div.* ii. 35. 74. The decree was no more than an opinion, on which the senate acted; Rubino, *Röm. Verf.* 88. n. 3; Aust, *Relig. d. Römer*, 201.

² An example of such boldness was that of C. Flaminius; Livy xxi. 63; cf. Plut. *Marcell.* 4; Zon. vii. 20. For the case of Appius Claudius Pulcher, see Livy ep. xix; Polyb. i. 52.

³ P. 112.

⁴ Cic. *Leg.* ii. 8. 21. Strictly it was the *templum minus* as distinguished from the *templum magnum*, a region of the sky; Varro, *L. L.* vii. 7; Fest. 157. 24; Serv. *in Aen.* i. 92.

⁵ Varro, *L. L.* vi. 86, 91. It was always rectangular, and was usually covered with a tent; Fest. 157. 24; Serv. *in Aen.* ii. 512; iv. 200; Nissen, *Templum*, 162 ff.; Wissowa, *Relig. u. Kult. d. Römer*, 455; in Pauly-Wissowa, *Real-Encycl.* ii. 2337 ff.; Valetton, in *Mnemos.* xx (1892). 338-90; xxi. 62-91, 397-440; xxiii. 15-79; xxv. 93-144, 361-385; xxvi. 1-93; Bouché-Leclercq, in Daremberg et Saglio, *Dict.* i. 554 f.

⁶ When wars were waged in the immediate vicinity of Rome the augurs could easily accompany the commander; cf. Livy iv. 18. 6; Cic. *Leg.* ii. 8. 21. But they certainly did not often go as far as Samnium; cf. Livy viii. 23. 16; ix. 38. 14. Though the augurs remained at Rome, the auspices followed the commander into the field; Livy xxii. 1. 6; p. 105, n. 1.

institute *templa* in or near the city.¹ For the exercise of their art they divided the world, so far as known to them, into augural districts. The central district was the city, limited by the pomerium,² beyond which, probably extending to the first milestone,³ lay a zone termed *ager effatus*,⁴ whose boundaries were marked by *cippi*.⁵ The rest of the world within their sphere of knowledge they divided into *ager Romanus*, which in its larger sense included the two districts above mentioned, *Gabinus*, *peregrinus*, *hosticus*, and *incertus*.⁶ For the *comitia* the two inner regions were alone important: (1) the auspication of assemblies held in the city had to be performed within the pomerium; (2) as often as the magistrate in passing from the city to the *Campus Martius* to hold the *comitia centuriata* crossed the pomerium,⁷ or more strictly the brook *Petronia*,⁸ he was obliged to take the special auspices of crossing. Beyond the *ager effatus* assemblies were not ordinarily held.

Originally the most common form of divination must have been the watching of the flight of birds, for it is from this ceremony that the word *auspicium* is derived.⁹ Legend accordingly asserts that Romulus founded the city on the Palatine under the auspices of twelve vultures.¹⁰ Before the end of the republic, however, all other forms of public *auspicia impetrativa* in the city had given way to the *caelestia*, especially the lightning and

¹ Livy iii. 20. 6; Aust, *Relig. d. Römer*, 201.

² Gell. xiii. 14. 1; Varro, *L. L.* v. 143; Wissowa, *Relig. u. Kult. d. Römer*, 456, n. 1.

³ Wissowa, in Pauly-Wissowa, *Real-Encycl.* ii. 2339.

⁴ Serv. in *Aen.* vi. 197; Varro, *L. L.* vi. 53; Wissowa, *Relig. u. Kult. d. Römer*, 456; also his article in Pauly-Wissowa, *Real-Encycl.* ii. 2339.

⁵ Varro, *L. L.* v. 143; Cic. *Leg.* ii. 8. 21; *CIL.* vi. 1233; Wissowa, *Relig. u. Kult. d. Römer*, 456 and notes.

⁶ Varro, *L. L.* v. 33.

⁷ The elder Tiberius Gracchus vitiated the election of his successors in the consulship by forgetting to renew the auspices, when, after entering the city to preside over the senate, he recrossed the pomerium to hold the election in the *Campus*; Cic. *N. D.* ii. 4. 11; *Div.* i. 17. 33; cf. Tac. *Ann.* iii. 19.

⁸ Fest. 250. 12; 157. 29; cf. Mommsen, *Röm. Staatsr.* i, 97, n. 1; Valetton, in *Mnemos.* xviii (1890). 209 f. The reason for the auspication on such occasions is differently stated by the authorities, but the interpretation given by Jordan-Hülssen, *Top. d. Stadt Rom*, I. iii. 472 f., that this brook marked the boundary of the city auspices, seems preferable.

⁹ *Avispex*, *auspex*, bird-seer; Wissowa, in Pauly-Wissowa, *Real-Encycl.* ii. 2580.

¹⁰ Livy i. 7. 1.

thunder.¹ The reason is that the heavenly signs could be most easily understood and carried greatest weight; whereas other auspices had to be held for each individual act, the celestial omens of the morning served the magistrate for all his undertakings during the entire day.² The effect of heavenly signs on assemblies of the people, however, was peculiar. Not only were comitia and contiones interrupted by storms;³ not only was it impious to hold an assembly while it was lightning or thundering,⁴ but even while the magistrate was auspicating at day-break, if a flash of lightning appeared on the left—a sign favorable for every other undertaking—he dared not hold the assembly on that day.⁵ Some favorable comitial sign the magistrate was supposed to perceive,⁶ but what it was we do not know.

The general rule that the auspices should be taken for an act on the very spot on which the magistrate intended to perform the act applied to the comitial auspices. For meetings on the Capitoline Hill they probably used the temple of Jupiter, dedicated for all time;⁷ for assemblies in the comitium the rostra, also a templum;⁸ and for the comitia centuriata the president's platform in the Campus Martius.⁹ Not only patrician magistrates but also tribunes of the plebs occupied templa in transacting business with the people.¹⁰

¹ Fest. ep. 64; Cic. *Div.* ii. 33. 71: "Haec certe quibus utimur, sive tripudio sive de caelo" (the auspicia tripudio being used in the military sphere, leaving only the auspicia de caelo for the city); cf. i. 16. 28; Mommsen, *Röm. Staatsr.* i. 79, n. 1; Aust, *Relig. d. Römer*, 203; Wissowa, in Pauly-Wissowa, *Real-Encycl.* ii. 2333.

² Dio Cass. xxxviii. 13. 3. Lightning from left to right especially in a clear sky was favorable; Dion. Hal. ii. 5. 2; Verg. *Aen.* ii. 692; vii. 141; ix. 628 (on the last, see Servius). A thunderclap was unfavorable to one entering office; xxiii. 31. 13; Plut. *Marcell.* 12; cf. Mommsen, *Röm. Staatsr.* i. 80, n. 2.

³ Tac. *Hist.* i. 18.

⁴ Cic. *Div.* ii. 18. 42.

⁵ Cic. *Div.* ii. 35. 74; 18. 43; Dio Cass. xxxviii. 13. 3 f.

⁶ *Censoriae Tabulae*, in Varro, *L. L.* vi. 86: "Ubi noctu in templum censor auspicaverit atque de caelo nuntium erit, praeconi sic imperato ut viros vocet."

⁷ Wissowa, in Pauly-Wissowa, *Real-Encycl.* ii. 2585. The auguraculum was doubtless used only by the augurs, not as Mommsen (*Röm. Staatsr.* i. 103, n. 2) supposes, by the magistrates.

⁸ Livy viii. 14. 12; Cic. *Vatin.* 10. 24: "In rostris, in illo inquam augurato templo ac loco."

⁹ Varro, *L. L.* vi. 91; Val. Max. iv. 5. 3; Cic. *Rab. Perd.* 4. 11; Wissowa, in Pauly-Wissowa, *Real-Encycl.* ii. 2585 f. ¹⁰ Valetton, in *Mnemos.* xxiii (1895). 28 ff.

Between midnight and morning¹ on the day of assembly the magistrate repaired to the templum.² There, placing himself on a solid³ seat at the door, usually facing eastward, he watched the heavens (spectio). Meanwhile he first asked the attendant, who always sat near,⁴ whether there was silence.⁵ If the answer was affirmative, he prayed Jupiter for a sign, which he described in a formula termed *legum dictio*,⁶ whereupon the attendant declared he saw it.⁷ In case of non-appearance of the sign or of a disturbance of the observation, the auspication was deferred to another morning.⁸ Before the time of Cicero, however, the ceremony had been so reduced to a pretence as practically to eliminate the possibility of failure.⁹

Both curiate¹⁰ and centuriate¹¹ assemblies were auspicated. Although for the tribal assemblies the question is more difficult, it seems reasonably certain that whereas a patrician magistrate took the auspices for the *comitia tributa*,¹² plebeian magistrates (tribunes and aediles of the plebs) did not.¹³

As to whether *contiones* were auspicated we are not clearly informed. The question concerns those only which were held by patrician magistrates. The auspication of *comitia* necessarily extended to the *contio* immediately preceding.¹⁴ It is

¹ *Censoriae Tabulae*, in Varro, *L. L.* vi. 86; Livy viii. 23. 15; x. 40. 2.

² The auspices had to be taken on the day the business was to be transacted, counting the day from midnight to midnight; Gell. iii. 2. 10; Consorinus xxiii. 4.

³ Verrius, in Fest. 347. 17; Serv. in *Aen.* ix. 4; Statius, *Theb.* iii. 459. Romulus, however, stood upright; Dion. Hal. ii. 5. 1.

⁴ P. 105.

⁵ Silence was essential to perfect auspices; Fest. 348. 29; ep. 64; Livy viii. 23. 15; ix. 38. 14; x. 40. 2; Pliny, *N. H.* viii. 57. 223.

⁶ Serv. in *Aen.* iii. 89; Livy i. 18. 9.

⁷ Cf. Livy xli. 18. 14.

⁸ Cf. Livy ix. 38. 15; 39. 1.

⁹ Cf. p. 115, 118, n. 2.

¹⁰ Livy v. 52. 15; ix. 38. 15 f.; 39. 1; Dion. Hal. ix. 41. 3; Cic. *Att.* ii. 7. 2; 12. 1; viii. 3. 3. Hoffmann, *Patric. u. pleb. Curien*, 29 ff., is of the opinion that the assembly which passed the *lex curiata* was not auspicated, his idea being that the *lex curiata* itself conferred the *ius auspiciorum publicorum*. There is no ground, however, for either of these suppositions.

¹¹ Cic. *N. D.* ii. 4. 11; Dion. Hal. vii. 59. 2. On the censorial auspication of the *comitia centuriata* for the *lustrum*, see Varro, *L. L.* vi. 86. Mommsen, *Röm. Staatsr.* i. 98, n. 6, supposes this to be the auspication of the censor's entrance into office (cf. 81, n. 1), believing that assemblies which did not vote were unauspicated. But cf. p. 111, n. 1 below.

¹² Dio Cass. liv. 24. 1; Cic. *Fam.* vii. 30. 1; cf. Varro, *R. R.* iii. 2. 1.

¹³ Dion. Hal. ix. 41. 3; 49. 5.

¹⁴ This is shown by the *Commentarium Acquisitionis* of M. Sergius, a quaestor, in Varro, *L. L.* vi. 91.

known, too, that the censors auspicated the lustral gathering of the centuries,¹ hence we may infer that magistrates and sacerdots were accustomed to take auspices for formal religious assemblies.² With these exceptions contiones were doubtless held without auspices by patrician as well as by plebeian magistrates.

III. *Auspicia Publica Oblativa*

If Jupiter had approved the holding of an assembly, the magistrate was not for that reason necessarily done with auspices. Though the impetrativa may have favored, prohibitive oblativa were still possible, for circumstances might cause the god to change his mind so as to forbid what he had previously sanctioned; and the warning omen might come at any time before the act was completed. Sometimes the magistrate himself discovered, or for the accomplishment of his purpose pretended to discover, the evil omen. When for instance Pompey was holding an assembly for the election of praetors, and Cato, a political opponent, offered himself as a candidate, Pompey, seeing the assembly unanimous for this man, declared that he heard a clap of thunder, and thus by an adjournment succeeded in preventing the election.³ Sometimes the magistrate was informed of the omen by (1) a private person, (2) an augur, or (3) another magistrate. In the first two cases the report was termed nuntiatio, in the third obnuntiatio.⁴ Information received from a

¹ *Censoriae Tabulae*, in Varro, *L. L.* vi. 86 f.: "Ubi noctu in templum censor auspicaverit atque de caelo nuntium erit . . . tum conventionem habet qui lustrum conditurus est." Mommsen's interpretation (*Röm. Staatsr.* i. 81, n. 2, 98, n. 6) which applies these auspices to the censor's entrance upon his office seems forced. It is not necessary, however, to suppose that this magistrate had to renew the auspices for every day of the census-taking; Mommsen, *ibid.* i. 113, n. 4.

² The current view (cf. Lange, *Röm. Alt.* ii. 718; Mommsen, *Röm. Staatsr.* i. 98; Karlowa, *Röm. Rechtsgesch.* i. 380; Liebenam, in Pauly-Wissowa, *Real-Encycl.* iv. 1150) that no contio was auspicated appears therefore to require modification.

³ Plut. *Pomp.* 52; *Cato Min.* 42.

⁴ Ael. Don. in Terent. *Ad.* iv. 2. 8: "Qui malam rem nuntiat, obnuntiat, qui bonam, adnuntiat: nam proprie obnuntiare dicuntur augures, qui aliquid mali ominis scaevumque viderint." In this late author (350 A.D.) obnuntiatio is ascribed to the augurs. When Cicero says to Antony (*Phil.* ii. 33. 83) "Augur auguri, consul consuli obnuntiasti," he does it only to find fault with the proceeding; cf. Momm-

private citizen the president could credit or not as he saw fit, or he could declare it irrelevant;¹ but the law compelled him to accept the nuntiatio of an augur or the obnuntiatio of another magistrate.

Prohibitive auspicia oblativa included evil omens of all kinds. When in 310 the dictator called the curiae for passing the *lex de imperio*, it chanced that the Curia Faucia was the first to vote (principium). Now this curia was ill omened because on two earlier occasions it had happened to be principium at a time of great national disaster. The dictator accordingly adjourned the meeting till the following day, when he again summoned it after renewing the auspicia impetrativa.² A case of epilepsy, by vitiating the business of the assembly, required an adjournment; and for that reason the malady was called the comitial sickness.³ In the later republic the chief oblativa had come to be caelestia; and it could happen that the auspicia impetrativa of any magistrate might as oblativa vitiate the comitia of another. For this reason when a higher magistrate was about to hold an assembly, he forbade the taking of auspices by all inferior to him, for fear they might annul his proceedings.⁴

Although the augurs had neither the auspicia impetrativa nor the right to watch the sky for unfavorable omens,⁵ they were competent to report (nuntiatio) unexpected oblativa to the magistrates.⁶ Their object in attending the comitia accordingly was

sen, *Röm. Staatsr.* i. 111, n. 2. These are the only instances known to us in which the distinction is not observed; Mommsen, *ibid.*; Wissowa, in Pauly-Wissowa, *Real-Encycl.* ii. 2335; Valetton, in *Mnemos.* xix (1891). 75 ff., 229 ff.; Bouché-Léclercq, in Daremberg et Saglio, *Dict.* i. 582.

¹ Cato, *De sacr. comm.* in Fest. 234. 33: "Quod ego non sensi, nullum mihi vitium facit;" Pliny, *N. H.* xxviii. 2. 17; Serv. in *Aen.* xii. 259: "In oblativis auguriis in potestate videntis est, utrum id ad se pertinere velit, an refutet et abominetur;" cf. Cic. *Div.* ii. 36. 77; Wissowa, *ibid.* ii. 2335. An example of an evil omen privately reported is given by App. *B. C.* i. 30.

² Livy ix. 38. 16 with ch. 39. 1.

³ Fest. 234. 27.

⁴ P. 104; Cato, *De re mil.* in Fest. 214-7: "Magistratus nihil audent imperare, ne quid consul auspici peremat."

⁵ P. 114.

⁶ Cic. *Phil.* ii. 32. 81: "Nos (augures) nuntiationem solum habemus, consules et reliqui magistratus etiam speculationem;" Varro, *Rer. hum.* xx, in Non. Marc. 92: "De caelo auspicari ius nemini praeter magistratum;" Fest. 333. 9 (quoted p. 106, n. 8). Madvig, *Röm. Staat.* i. 267, supposes that the augurs had both the spectio and the nuntiatio; but this view contradicts the clear statement of Cicero; Mommsen,

not only to assist the president with their special knowledge,¹ but also to witness the religious legality of the proceeding. In the latter function the augur derived great influence² from the possibility of an investigation into such legality by the augural college and the senate, which might result in the annulment of the act.³ For this reason witnessing augurs were granted the privilege of adjourning the assembly in case they perceived unfavorable omens.⁴ Cicero⁵ describes in detail such an adjournment of an electoral assembly of centuries: "Behold the day for the election of Dolabella! The prerogative century is drawn by lot, he (the augur) remains quiet. The vote is announced, he is silent. The first class is called and the announcement made. Then as usual the suffragia (of the equites?) were summoned; then the second class is called. All this happened more quickly than I have told it.

"When the business is over, that excellent augur says, 'We adjourn to another day.' O remarkable impudence! What (omen) had you seen? What had you felt? What had you heard?" Antony, who was both consul and augur, presiding over the electoral assembly, allowed the voting to continue till a majority was nearly reached in favor of Dolabella, when, making use of the augural formula, he adjourned the meeting. This procedure was in itself legal; but Antony had from the beginning of the year boasted of his intention to prevent through augury this man's election. As only magistrates, through their right to the *spectio*, to be explained hereafter, could with certainty predict an evil omen,⁶ it was evident that Antony, acting merely as augur, made a fictitious report.

Augurs were always present at meetings of the *curiae*,⁷ of

Röm. Staatsr. 1. 109, n. 1. The fact is, as has been stated (p. 106), they had the *spectio* for their own functions only, and as assistants of the magistrates simply the *nuntiatio*.¹ The formula used is "in auspicio esse;" *Cic. Att.* ii. 12. 1.

² *Cic. Leg.* ii. 8. 20 f.; iii. 4. 11; 19. 43; *N. D.* ii. 3. 8; *Div.* ii. 33. 71; cf. Lange, *Röm. Alt.* i. 339.

³ P. 106 f.

⁴ *Cic. Phil.* ii. 33. 83; *Div.* i. 40. 89: "Privati eodem sacerdotio praediti rem publicam religionum auctoritate rexerunt," an exaggeration; *Leg.* ii. 12. 31; *Livy* i. 36. 6. In this capacity the augur did not look for omens with a view to reporting them, but merely announced those which came unexpectedly.

⁵ *Phil.* ii. 33. 82 f.

⁶ P. 115.

⁷ Three were present at *curiate assemblies*; *Cic. Att.* iv. 17. 2; cf. ii. 7. 2.

the centuries,¹ and of the tribes under the presidency of a patrician magistrate.² That they attended the meetings of the plebs as well and had the same relation to the plebeian as to the other assemblies is necessarily implied in Cicero's³ question, "What shows greater religious power than to be able to grant or refuse to grant the right to transact business with the people or with the plebs?"

If the person who reported the evil omen was not an augur but a magistrate, the president was equally bound to heed it and to dismiss the assembly;⁴ and the force of the obnuntiatio was not in any way affected by the relative official rank of the two persons concerned. When accordingly a higher magistrate had set a day for an assembly, he forbade all inferior magistrates not only to take the auspicia impetrativa,⁵ but also to watch the sky — *de caelo servare* — for any purpose on that day, for fear that some omen unfavorable to the comitia might be seen.⁶ A consul for instance could prevent a quaestor from scanning the heavens on any particular day; and the senate on the rare occasions when it felt itself sufficiently strong, suspended for a particular act of the assembly the right of all magistrates to receive and to announce unfavorable omens.⁷ In the absence of senatorial interference it remained possible for any higher magistrate to scan the heavens — *de caelo servare* — on an assembly day appointed by another, and to vitiate the comitia by reporting an unfavorable omen. We find accordingly a consul obnuntiating against a colleague⁸ and against the pontifex maximus,⁹

¹ In this case the augur not only assisted with his special knowledge, but also acted as crier; Varro, *L. L.* vi. 95.

² Varro, *R. R.* iii. 2. 2; 7. 1.

³ *Leg.* ii. 12. 31.

⁴ Cic. *Phil.* ii. 32. 81.

⁵ *P.* 104, 112.

⁶ Gell. xiii. 15. 1; cf. Rubino, *Röm. Verf.* 79.

⁷ Cic. *Att.* i. 16. 13: "Lurco tribunus pl. solutus est et Aelia et Fufia, ut legem de ambitu ferret;" *Sest.* 61. 129: "Decretum in curia . . . ne quis de caelo servaret, ne quis moram ullam adferret" (that no one should watch the heavens or interpose any delay in the proceedings for the recall of Cicero). Both measures here referred to were so popular and the magistrates were so nearly unanimous in their support that the senate felt it could in these cases forestall the opposition of one or two opponents.

⁸ In the famous case of Bibulus against Caesar, 59; Suet. *Caes.* 20; cf. Dio Cass. xxxviii. 4. 2 f.

⁹ Proved by the fact that the watching of the sky by Bibulus should have annulled the arrogation of Clodius (Cic. *Dom.* 15. 39 f.; *Har. Resp.* 23. 48; *Att.* ii. 12. 2; 16.

a praetor against a tribune of the plebs,¹ and a tribune against a consul² or a censor,³ as well as against a colleague.⁴

So certain was it that a magistrate who looked for a bad omen would see one that the expression "to watch the sky" became equivalent to discovering an unpropitious sign. The rule was therefore formulated that "religion forbade the transaction of any business with the people when it was known that the sky was watched."⁵ If accordingly a magistrate announced that he intended to scan the heavens on the day appointed for an assembly, this declaration was in itself sufficient in the ordinary course of events to compel a postponement. In the year 57 Milo, a tribune of the plebs, pushed the custom to extremes by declaring his intention to observe the sky on all comitial days.⁶ Strictly the observation had to be made and reported before the assembly met. "Can any one divine beforehand," Cicero⁷ asks, "what defect there will be in the auspices, except the man who has already determined to watch the heavens? This in the first place the law forbids to be done in the time of an assembly; and if any one has been observing the sky, he is bound to give notice of it, not after the comitia are assembled, but before they meet." In the case belonging to the year 57 referred to above, Milo, the tribune, came into the Campus Martius before midnight in order to anticipate the arrival of the consul Metellus, who wished to hold the elections. The assembly ordinarily met at sunrise, and

2; *Prov. Cons.* 19. 45; Mommsen, *Röm. Staatsr.* i. 113, n. 2), which was brought about by an act of the curiae under the presidency of the supreme pontiff. Any one competent to observe the heavens necessarily had the obnuntiatio.

¹ *Cic. Sest.* 36. 78. Probably obnuntiatio against tribunes is referred to by *Cic. Phil.* v. 3. 7 f. and by *Ascon.* 68 (the last is the abolition of the Livian laws of 91), but the obnuntiating magistrate is not known. In *Cic. Vatin.* 7. 17 ("Num quem post urbem conditam scias tribunum pl. egisse cum plebe, cum constaret servatum esse de caelo") the principle is laid down that any one who has the right to obnuntiate may use this power against a tribune. The validity of the tribunician law for the interdiction of Cicero from fire and water was maintained on the ground that no one was then watching the sky; *Cic. Prov. Cons.* 19. 45.

² *Cic. Sest.* 37. 79; cf. 38. 83; *Phil.* ii. 38. 99; *Att.* iv. 3. 3 f.; 17. 4; *Q. Fr.* iii. 3. 2 (cf. Drumann-Gröbe, *Gesch. Roms*, iii. 6; Mommsen, *Röm. Staatsr.* i. 113, n. 3); *Dio Cass.* xxxix. 39; *Plut. Crass.* 16; *App. B. C.* ii. 18. 66 (cf. *Cic. Div.* i. 16. 29); *iii.* 7. 25.

³ *Cic. Att.* iv. 9. 1.

⁴ *Cic. Vatin.* 7. 16.

⁵ *Cic. Dom.* 15. 39: "(Augures) negant fas esse agi cum populo, cum de caelo servatum sit."

⁶ *Cic. Att.* iv. 3. 3.

⁷ *Cic. Phil.* ii. 32. 81.

could not convene after midday. Milo accordingly remained on that day till noon, without seeing the consul. Then Metellus demanded that for the future the *obnuntiatio* should be served on him in the Forum; it was unnecessary, he said, to go to the Campus before daybreak; he promised to be in the comitium at the first hour of the day. As Milo was coming into the Forum before sunrise on the next comitial day, he discovered Metellus stealing hurriedly to the Campus by an unusual route. The tribune came upon him and served the notice.¹

The consul's announcement of intention to watch the sky might be strengthened by a proclamation declaring certain or all comitial days for the remainder of the year to be holidays, on which the people could not legally transact business in assembly.²

Although the *obnuntiatio* doubtless originated in the early republic, it played no considerable part in political strife till after the Gracchi. A great impetus to the abuse of the power was given by the Aelian and Fufian laws, which were probably two plebiscites³ passed about 150.⁴ What features of these statutes were new has not been precisely determined. It is certain, however, that they made possible the condition in which we find the *spectio* and *obnuntiatio* before the legislation of Clodius on the subject in 58. As the tribune did not originally have the *obnuntiatio*, we may infer that in all probability these laws granted him the right to exercise it against patrician mag-

¹ Cic. *Att.* iv. 3. 4. In like manner Bibulus, after *obnuntiatio*ing in vain against Caesar's agrarian law (p. 439), determined to remain at home and continually to watch the sky for the remainder of the year. This procedure invalidated all acts passed during that time by the assembly; Cic. *Dom.* 15. 39 f.; *Har. Resp.* 23. 48; *Prov. Cons.* 19. 45.

² This procedure too was followed by Bibulus; Dio Cass. xxxviii. 6. 1; cf. Mommsen, *Röm. Staatsr.* i. 82, n. 3.

³ That they were two separate enactments, and not one complex statute by joint authors, is clearly indicated by Cic. *Har. Resp.* 27. 58: "Sustulit duas leges Aeliam et Fufiam;" *Sest.* 15. 33. Generally they are spoken of as separate laws, though Cicero occasionally, as *Vatin.* 5. 7, groups them in one. That they were plebiscites is held probable by Mommsen, *Röm. Staatsr.* i. 111, n. 4.

⁴ When Cicero, *Vatin.* 9. 23, states that these laws survived the ferocity of the Gracchi, the audacity of Saturninus, etc., he places their origin in the times before the Gracchi; and when he speaks of their abolition, 58, he tells us that they had been in force about a hundred years (*Fis.* 5. 10).

istrates in the way described above. Similarly from the fact that the plebeian tribal assembly was not originally subject to religious obstruction on the part of the government, it is reasonable to conclude that the Aelian and Fufian statutes gave the patrician magistrates the *obnuntiatio* against that body.¹ It was equivalent to a power of veto, which the aristocracy could now exercise upon tribunician legislation, hence Cicero² regards the two statutes as most holy³ means of "weakening and repressing the fury of the tribunes," and as the "surest protection of the commonwealth."⁴ Notwithstanding the opinion of Lange,⁵ that the *obnuntiatio* was restricted to legislation, it seems clear from the words of Cicero,⁶ as well as from the lack of reference in the sources to such a limitation, that it applied equally to elections. So long, however, as the nobility could depend for support upon the tribunes, it had little need of such a power. But in the last years of the republic, after the tribunician veto had been undermined by Ti. Gracchus and Appuleius Saturninus, and the tribunes were again acting independently of the senate as in the early history of their office, optimates and populares, taking full advantage of the Aelian and Fufian laws, alike exploited the auspices recklessly for partisan objects. Their behavior was a sign of both religious and political disintegration. Vatinius, tribune of the plebs in 59, had the boldness utterly to disregard these statutes;⁷ and in 58 the tribune Clodius repealed them in so far as they affected legislation,⁸ whereas for elections the *obnuntiatio* still remained in force.⁹ The misuse of auspices for political purposes dates back, according to Livy,¹⁰ to the beginning of the Samnite wars.

¹ Dio Cass. xxxviii. 13.

² *Vatin.* 7. 18.

³ *Ibid.* 9. 13.

⁴ *Red. in Sen.* 5. 11; cf. *Har. Resp.* 27. 58; *Pis.* 4. 9: "Propugnacula murique tranquillitatis atque otii." With other provisions of these statutes (cf. *Cic. Att.* i. 16. 13; Schol. Bob. 319 f.) the present discussion is not concerned. See further on these laws, p. 358 f. below.

⁵ *Kleine Schriften*, i. 274 ff., 341; *Röm. Alt.* ii. 315, 477 f.

⁶ *Att.* iv. 3. 4; 16. 5; *Phil.* ii. 32. 81.

⁷ *Cic. Vatin.* 6. 15; 7. 18.

⁸ *Cic. Red. in Sen.* 5. 11: "Legem tribunus pl. tulit, ne auspiciis obtemperaretur, ne obnuntiare concilio aut comitiis, ne intercedere liceret, ut lex Aelia et Fufia ne valeret;" *Har. Resp.* 27. 58; *Sest.* 15. 33; *Prov. Cons.* 19. 46; *Pis.* 4. 9; 5. 11; Dio Cass. xxxviii. 13. 5 f.; 14. 2; Ascon. 9; Schol. Bob. 319 f.

⁹ *Cic. Att.* iv. 3. 4; 16. 5; *Phil.* ii. 32. 81; cf. Fröhlich, in Pauly-Wissowa, *Real-Encycl.* iv. 84; Drumann-Gröbe, *Gesch. Roms*, ii. 204 f.

¹⁰ VIII. 23. 13 ff.

Although this may be an anticipation of later conditions, there can be no doubt as to the attitude of statesmen toward the custom in the closing years of the Punic wars.¹ In the time of Clodius and Cicero, while some maintained a sincere belief in these ceremonies, doubtless the great majority of public men saw in their use nothing more than political chicanery calculated, by deceiving the multitude, to keep the real power in the hands of a few.²

Rubino, J., *Untersuchungen über röm. Verfassung und Geschichte*, 34-106; Nissen, H., *Das Templum*; Mommsen, *Röm. Staatsrecht*, i. 76-116; Marquardt, J., *Röm. Staatsverwaltung*, iii. 397-415; Lange, L., *Röm. Altertümer*, 3 vols. index s. Augures, Auspicia, Inauguratio, etc.; *De legibus Aelia et Fufia commentatio*, in *Kleine Schriften*, i. 274-341; Herzog, E., *Geschichte und System der röm. Staatsverfassung*, 621-30, see also index s. Augures, Auspicien; Müller-Deecke, *Etrusker*, ii. 114-27; Gilbert, O., *Geschichte und Topographie der Stadt Rom im Altertum*, 3 vols., index s. Auguraculum, Augures; Wissowa, G., *Religion und Kultus der Römer*, 450-60; *Augures*, in Pauly-Wissowa, *Real-Encycl.* ii. 2313-44; *Auspictum*, *ibid.* ii. 2580-7; Aust, E., *Religion der Römer*, index s. Auguraculum, Augurn, Auspicia, etc.; *Iuppiter Elicius*, in Roscher, *Ausführliches Lexikon der griech. und röm. Mythologie*, ii. 656-61; Bouché-Leclercq, A., *Histoire de la Divination dans l'Antiquité*, iv. 134-285 (sources and modern literature, p. 180 f.); *Augures*, in Daremberg et Saglio, *Dict.* i. 550-60; *Auspicia*, *ibid.* i. 580-5; Spinazzola, V., *Augures*, in Ruggiero, *Dizionario epigrafico*, i. 778-810; Ruggiero, *ibid.* i. 950 f.; De Marchi, A., *Il Culto privato di Roma antica*, i. 152 ff., 232 ff.; Valeton, I. M. J., *De modis auspicandi Romanorum*, in *Mnemosyne*, N. S. xvii (1889). 275-325, 418-52; xviii. 208-64, 406-56; *De iure obnuntiandi comitiis et conciliis*, *ibid.* xix (1891). 75-113, 229-70; *De templis Romanis*, *ibid.* xx (1892). 338-90; xxi. 62-91, 397-440; xxiii. 15-79; xxv. 93-144, 361-85; xxvi. 1-93 (papers in the last two vols. are on the pomerium); Luterbacher, F., *Der Prodigien glaube und Prodigienstil der Römer*, 2 ed.; Wülker, L., *Die geschichtliche Entwicklung des Prodigienwesens bei den Römern*; Willoughby, W. W., *Political Theories of the Ancient World*, ch. xv.

¹ Polyb. vi. 56. 6 ff.

² The former view was taken by Appius Claudius Pulcher, consul in 54 and author of a work *De disciplina augurali* (Fest. 298. 26), and the latter by C. Claudius Marcellus, consul in 50, and by Cicero — all three being public augurs; Cic. *Div.* i. 47. 105; ii. 18. 42; 33. 70; 35. 75; *Leg.* ii. 13. 32 f.; *N. D.* i. 42. 118; in general *Div.* ii. At that time auspices were a mere pretence; the chicken omens were forced, and the celestial signs were not seen; Cic. *Div.* ii. 33 f., 71 f.; Dion. Hal. ii. 6. On the decline of augury and the auspices, see Wissowa, in Pauly-Wissowa, *Real-Encycl.* ii. 2315, 2333.

PART II

THE ASSEMBLIES

ORGANIZATION, PROCEDURE, AND FUNCTIONS, RESOLUTIONS, STATUTES, AND CASES

CHAPTER VI

COMITIA AND CONCILIUM

IN treating of the distinction between comitia and concilium scholars have invariably begun with the juristic definition of Laelius Felix,¹ quoted by Gellius,² "He who orders not the whole people but some part of it to be present (in assembly) ought to proclaim not comitia but a concilium;" they have limited themselves to illustrating this definition, and to setting down as lax or inaccurate the many uses of the two words which cannot be forced into line with it. The object of this discussion, on the contrary, is to consider all the occurrences of these words in the principal extant literature, especially prose, of the republic and of the Augustan age—a period in which the assemblies were still in existence—for the purpose of testing the definition of Laelius, and of establishing new definitions by induction in case his should prove wrong.

It is convenient to begin with Livy, who though an imperial writer, and under the stylistic influence of his age, probably adhered in the main to the technical terminology of the republican annalists from whom he drew. The first point which will be established is that in Livy's usage the difference between

¹ Probably the jurist of that name who lived under Hadrian, and who is mentioned by Paulus, in *Dig.* v. 4. 3.

² XV. 27. 4: "Is qui non universum populum, sed partem aliquam adesse iubet, non comitia, sed concilium edicere debet."

comitia and concilium is not a difference between the whole people and a part of the people.¹

The plebeian tribal assembly is termed comitia in Livy ii. 56. 1, 2; ii. 58. 1; ii. 60. 4; iii. 13. 9 ("Verginio comitia habente conlegae appellati dimisere concilium," in which comitia and concilium in one sentence are applied to the same assembly); iii. 17. 4 (the comitia for passing the Terentilian law, which from Livy's point of view was the plebeian assembly);² iii. 24. 9; iii. 30. 6; iii. 51. 8 (comitia of plebeian soldiers for electing military tribunes and tribunes of the plebs); iii. 54. 9, 11: (plebeian comitia under the pontifex maximus); iv. 44. 1; v. 10. 10; vi. 35. 10 ("Comitia praeter aedilium tribunorumque plebi nulla sunt habita"); vi. 36. 9 (the comitia for voting on the Licinian-Sextian laws); vi. 39. 5; xxv. 4. 6; xxxiv. 2. 11; xlv. 35. 7. Other examples of comitia of a part of the people are Livy ii. 64. 1 (as the plebeians refused to participate in the consular election, the patricians and clients held the comitia); xxvi. 2. 2 (comitia held by the soldiers, and hence by only a part of the people, for the election of a propraetor). Still more to the point are the comitia sacerdotum: for electing a chief pontiff, Livy xxv. 5. 2; for electing an augur, xxxix. 45. 8; for electing a chief curio, xxvii. 8. 1. Comitia sacerdotum were composed of seventeen tribes, and hence of only a part of the people.³ Lastly is to be noted the fact that the plebeian assembly met on a comitalis dies; Livy iii. 11. 3.

It is now sufficiently established that Livy often applies the term comitia to the assembly of plebs and to other assemblies which included but a part of the people. It is equally true that he uses concilium to denote an assembly of the whole people. The principal instances of Roman assemblies are:

- (1) Livy i. 8. 1: "Vocataque ad concilium multitudo, quae coalescere in populi unius corpus nulla re praeterquam legibus poterat, iura dedit."
- (2) i. 26. 5: "Concilio populi advocato" (for the trial of Horatius).

¹ For the purpose of the present discussion the plebeian assembly—that is, the assembly which convened under the tribunes of the plebs and which issued plebi scita—is assumed to be a gathering of only a part of the people. If it admitted patricians (p. 300), and if therefore there was no assembly comprised exclusively of plebeians, no argument would be needed to prove the error of the conventional distinction between comitia and concilium.

² In Livy iii. 16. 6, this meeting is called a concilium.

³ P. 341.

- (3) i. 36. 6: "Auguriis certe sacerdotioque augurum tantus honos accessit, ut nihil belli domique postea nisi auspicato gereretur, concilia populi, exercitus vocati, summa rerum, ubi aves non admississent, dirimerentur."
- (4) ii. 7. 7: "Vocato ad concilium populo" (representing the consul as calling the people to an assembly).
- (5) iii. 71. 3: "Concilio populi a magistratibus dato" (for settling the dispute between Ardea and Aricia).
- (6) vi. 20. 11: "Concilium populi indictum est" (an assembly of the people which condemned Marcus Manlius).

These instances are well known, and have often been discussed. It is enough for our purpose to note here that they prove Livy's willingness to designate assemblies of the whole Roman people as concilia. But Mommsen¹ was not satisfied with regarding all these cases as inaccurate. In spite of Laelius he believed that concilium could sometimes properly apply to assemblies of all the people. With reference to the first example given above he says that where concilium denotes an assembly of all the people, the contio is meant—in other words, a concilium of all the people is an assembly which has not been summoned with a view to voting, and is not organized in voting divisions. This new definition might explain example (1), for possibly Livy did not think of the first Roman assembly as voting on the laws which Romulus gave, or even as organized. Unfortunately Mommsen tries to support his definition by example (2), which refers to the assembly for the trial of Horatius. But in ch. 26. 12 the same assembly, which must have been the gathering of the curiae, and which Cicero² speaks of as comitia, voted the acquittal of the accused. Hence it could not have been a mere contio. Another passage cited in support of his view, Livy ii. 7. 7, example (4), represents the consul as calling the people to a concilium. First he addressed them ("in contionem escendit"), and afterward laws were passed on the subject of which he treated in his speech—evidently by the same assembly; hence the concilium populi here mentioned was something more than a contio. Another illustration which Mommsen offers, but which, having to do with a Roman assembly only by implication, is not included in the list of examples given

¹ *Röm. Forsch.* i. 170, n. 8; *Röm. Staatsr.* iii. 149, n. 3.

² *Mil.* 3. 7; cf. p. 122, n. 3 below.

above, is Livy v. 43. 8: "When he had pushed into the midst of the *contio*, though hitherto accustomed to keep away from such *concilia*."¹ The passage refers to a meeting of the *Ardeates* for consulting in regard to the sudden approach of the Gauls. Gatherings of the kind were called *concilia*, but the word *contio* is also introduced into the passage with reference to a speech made in the assembly. The implication is that such *concilia* of all the people for deliberation were held also at Rome. The circumstances indicate that it met with a view also to taking action, and that it was therefore not a simple *contio*. This passage accordingly offers no support to Mommsen's view that when applied to the whole people *concilium* is merely a listening, not an acting, assembly.² Summing up the evidence for the new definition of *concilium*, we may say that, were it true, it might apply to Livy i. 8. 1, though it is unessential to the explanation either of this passage or of any other. A single case, too, even if it were clear, is not a sufficient basis for a generalization; and though we must agree with Mommsen that the juristic definition does not cover the cases cited above, it is necessary to reject his amendment as unsatisfactory.³

In fact Mommsen soon discovers cases which, from his own admission, neither his definition nor that of Laelius will explain, for instance, Livy i. 36. 6, example (3). On this citation Mommsen⁴ remarks that *concilia* in this connection could not mean *contiones*, with which in his opinion the auspices had nothing to do; it could not refer to the plebeian assemblies, which he also

¹ "Cum se in mediam contionem intulissent, abstinere suetus ante talibus conciliis."

² His last citation on this point, Livy v. 47. 7 ("Vocatis ad concilium militibus") has reference to the soldiers only—to a part of the people—and is therefore altogether unlike the others. For an explanation of it, see p. 135 f.

³ A closely related question is whether *concilium* is ever restricted to the deliberative stage of a session preliminary to the division into voting units, with *comitia* limited in a corresponding manner to the final, voting stage of the session. A few passages, as examples (2) and (4), might be explained by such a conjecture, but others, as Livy iii. 13. 9 ("Virginio comitia habente conlegae appellati dimisere concilium") prove the supposition impossible. *Concilium* denotes the assembly in its final as well as in its initial stage, voting as well as deliberating, whereas in ordinary political language *contio* is used to denote the merely listening or witnessing assembly, whether organized or unorganized, whether called to prepare the citizens for voting or for any other purpose.

⁴ *Röm. Forsch.* i. 170, n. 8.

assumes to have been free from the auspices.¹ He concludes, therefore, that it denotes the "patricio-plebeian" tribal assemblies.² But why Livy should here be thinking merely of the tribal assemblies, especially in connection with a time before they had come into existence, no one could possibly explain. It is far more reasonable to assume that he intended to include all kinds of assemblies, curiate, centuriate, and tribal, which required the auspices. The next citation which Mommsen finds difficult is Livy iii. 71. 3, example (5) — an assembly of the tribes meeting under the consuls to decide the dispute between Ardea and Aricia over a piece of territory. The assembly voted (ch. 72. 6) that the land in question belonged to the Roman people. Mommsen's³ explanation of concilium in this connection is that the resolution adopted by this assembly affected foreign states only, and was not binding on Rome; hence he assumes that comitia are an assembly whose resolutions are binding on the Roman state. Here then we have a third definition of concilium based like the second on a single case. But Mommsen thinks he finds some evidence for his last definition in the fact that assemblies of foreign states are usually termed concilia; and he assumes the reason to be that their resolutions were not binding on Rome. It would be strange, however, if in calling foreign institutions by Latin names (rex, senatus, populus, plebs, praetor, dictator, etc.) Roman writers attempted to show a connection between these institutions and Rome, seeing that in most cases no such connection could exist. The proposed explanation of this use of concilium becomes actually absurd when it is extended to foreign comitia; Mommsen certainly would not say that the resolutions of the Syracusan comitia, mentioned by Livy, were binding on Rome.

His last and most difficult case is Livy vi. 20. 11 — the concilium populi which condemned Marcus Manlius, example (6), p. 121. Evidently this was the centuriate assembly, which alone

¹ Ibid. i. 195 f. It is true that the plebeian assembly came to be subject to the obnuntiatio (p. 117), but it would be absurd on this ground to suppose that Livy's statement refers especially to gatherings of the kind.

² This statement admits that concilium here designates an assembly of the whole people; but Mommsen does not tell us why the word applies with greater propriety to the "patricio-plebeian" tribal assembly than to the centuriate assembly. For the true reason, see p. 137, n. 5.

³ *Röm. Staatsr.* iii. 149, n. 3.

had the right to try capital cases, and which alone had to meet outside the pomerium. Various feeble explanations have been proposed; but Mommsen, with others, prefers to consider the word wrongly used. It is true that if we accept the juristic definition, we must conclude that Livy is guilty of error not only in this case but wherever he applies the term *concilium* to an assembly of all the people, Roman or foreign; but as we shall proceed by induction, we must, at least provisionally, consider all the cases correct, and frame our definitions accordingly.

We have now reviewed a number of passages in Livy in which *concilium* includes all the Romans. There remains a large group of passages which refer to foreign assemblies. In considering these cases we are to bear in mind that the Romans apply to foreign institutions in general the Latin terms with which they are familiar, and in the same sense in which these terms are used of Roman institutions; in this way only could they make themselves understood.

Concilium populi and *concilia populorum* are frequent (e.g. Livy vii. 25. 5; x. 10. 11; 14. 3; xxi. 14. 1; xxiv. 37. 11), and most of the assemblies of foreign states designated as *concilia* are known to have admitted both nobles and commons.

Instances of *concilia* in foreign states are: Alba Longa, Livy i. 6. 1; Latins, Livy i. 50-52; vi. 10. 7; vii. 25. 5; viii. 3. 10; xxvii. 9. 2; Aequians, Livy iii. 2. 3; ix. 45. 8; Antium, Roman colony at, Livy iii. 10. 8; Veii, Livy v. 1. 8; Etruria, Livy v. 17. 6; x. 10. 11; 13. 3; 14. 3; Gauls, Livy v. 36. 1; xxi. 20. 1; Hernicans, Livy vi. 10. 7; Samnites, Livy x. 12. 2; Saguntines, Livy xxi. 14. 1; Iberians, Livy xxi. 19. 9, 11; xxix. 3. 1, 4; Enna, Livy xxiv. 37. 11; Aetolians, Livy xxvi. 24. 1; xxvii. 29. 10; xxxi. 29. 1, 2, 8; 32. 3, 4; xxxiii. 3. 7; 12. 6; xxxiv. 41. 5; xxxv. 32. 3, 5; 33. 1, 4; 34. 2; 43. 7; xxxvi. 26. 1; 28. 7, 9; xxxviii. 9. 11; 10. 2; xlii. 6; Achaeans, Livy xxvii. 30. 6; xxxi. 25. 2; xxxii. 19. 4, 5, 9; 20. 1; 21. 2; 22. 3, 9, 12; xxxv. 25. 4; 27. 11; 48. 1; xxxvi. 31. 9, 10; 32. 9; 34. 1; 35. 7; xxxviii. 31. 1; 32. 3; 34. 5; 35. 1; xxxix. 33, 35, 36, 37, 48, 50; xli. 24; xlii. 12; xliii. 17; Epirus, Livy xxxii. 10. 2; xlii. 38. 1; Boeotians, Livy xxxiii. 1. 7; 2. 1, 7; xxxvi. 6. 3; xlii. 43, 44, 47; Acarnanians, Livy xxxiii. 16. 3, 5, 8; xliii. 17; Thessalians, Livy xxxiv. 51. 5; xxxv. 31. 3; xxxvi. 8. 2; xlii. 38; Argos, Livy xlii. 44; Macedonians, Livy xlv. 18.

Though most of these *concilia* are known to have been assemblies of the whole people, nobles and commons, very rarely, as in Livy x. 16. 3, the word signifies a council of a few men—in this case, of the leading men of Etruria (cf. xxxvi. 6.

6); and twice, at Capua, we hear of a plebis concilium; Livy xxiii. 4. 4; xxvi. 16. 9. From the frequency of the first-mentioned use we must conclude that Livy does not hesitate to designate as concilia assemblies of the whole people.

Comitia, on the other hand, more rarely applies to foreign assemblies. We hear of comitia of the Veientans (Livy v. 1. 1), of the Syracusans (Livy xxiv. 23. 1; 26. 16; 27. 1), of the Argives (Livy xxxii. 25. 2), of the Boeotians (Livy xxxiii. 27. 8), and of the Thessalians (Livy xxxiv. 51. 5).

The conclusions thus far reached are as follows:

I. As to Comitia:

1. Livy frequently uses comitia to denote the tribal assembly of the plebs.
2. He always uses comitia to denote the assembly for the election of priests, consisting of but seventeen tribes, and hence of a minority of the people.

II. As to Concilium:

1. He frequently uses concilia (rarely comitia) to denote foreign assemblies of all the people.
2. Less frequently he uses concilia to denote Roman assemblies of all the people.

Mommsen and others admit, however, that Livy's usage does not conform strictly to the definition of Laelius Felix; they assume accordingly that the exact meaning of comitia was lost in imperial times, that for the correct usage we should look to the republican writers.

As Caesar has little occasion for employing the terms in relation to the Roman assemblies, his usage on purely Roman grounds cannot be made out. Foreign assemblies—that is, of Gauls—he generally designates as concilia: *B. G.* i. 30, 31; iii. 18; v. 2, 6, 24, 56 f.; vi. 3, 20; vii. 63, 89; viii. 20 (Hirtius). In all these cases the concilium is a tribal or national assembly including both nobles and commons; more rarely the word signifies a council of chiefs; *B. G.* i. 33; vii. 75; and perhaps vii. 1. Once he applies comitia to Gallic assemblies; *B. G.* vii. 67. So far, therefore, as his usage can be determined, it does not differ from Livy's. From Macrobius, *Sat.* i. 16. 29 (“Contra Julius Caesar XVI auspiorum negat, nundinis contionem advocari posse: id est cum populo agere: ideoque nundinis Romanorum haberi comitia non posse”), it appears that in

Lucius Julius Caesar's¹ augural language, which must certainly have been conservative, *contio* was a general word including *comitia*. This passage, with the similar one in Cicero, *Att.* iv. 3. 4, suggests that the distinctions between *contio*, *comitia*, and *concilium*, far from breaking down in late republican times, were only then taking form.

The material furnished by Sallust is more conclusive. In *Hist.* ii. 22, *concilium Gallorum* doubtless signifies a national assembly; and although generally *comitia* refers to the centuriate gathering (*Cat.* 24, 26; *Iug.* 36, 44), in *Iug.* 37 ("P. Lucullus and L. Annius, tribunes of the plebs, against the efforts of their colleagues strove to prolong their office, and this dissension put off the *comitia* through all the rest of the year")² it clearly designates the assembly of the plebs. His usage accordingly, which allows *concilium* sometimes to apply to an assembly of the whole people and *comitia* to an assembly of a part of the people, does not differ from that of Livy.

Cicero, however, is the author on whom scholars rely in support of the definition of Laelius. Following Berns,³ they say Cicero has violated the rule but once, *Att.* i. 1. 1, in which occurs the phrase *comitiis tribuniciis*. Berns' examination of Cicero must have been exceedingly hasty, as he has left a number of instances unnoticed. The following passage is especially to the point, *Q. Fr.* ii. 14 (15 b). 4:

"The candidates for the tribuneship have made a mutual compact—having deposited five hundred sesteria apiece with Cato, they agree to conduct their canvass according to his direction, with the understanding that any one offending against it is to be condemned by him. If these *comitia*, then, turn out to be pure, Cato will have been of more avail than all laws and jurors put together."⁴

¹ Undoubtedly the Caesar who was consul in 64 B.C.; Teuffel and Schwabe, *Rom. Lit.* i. 348. § 3; Drumann-Gröbe, *Gesch. Roms*, iii. 120, n. 6.

² "P. Lucullus et L. Annius, tribuni plebis, resistentibus collegis continuare magistratum nitebantur, quae dissensio totius anni *comitia* impediēbat."

³ *De com. trib. et conc. pl. discr.* (1875); Mommsen, *Röm. Staatsr.* iii. 149, n. 1; Kornemann, in Pauly-Wissowa, *Real-Encycl.* iv. 802. The correctness of my results is acknowledged in the *Thesaurus linguae latinae*, iv. 44 ff.

⁴ "Tribunicii candidati compromiserunt HIS quingenis in singulos apud M. Catonem depositis petere eius arbitratu, ut, qui contra fecisset, ab eo condemnaretur. Quae quidem *comitia* si gratuita fuerint, ut putantur, plus unus Cato potuerit quam omnes leges omnesque iudices." The translation given above is Shuckburgh's.

The tribunician comitia are the only comitia concerned in Cato's transaction. Again in *Att.* ii. 23. 3 ("It is of great interest to me that you should be present at Rome, if not at the comitia for his election, at least after he has been declared elected")¹ Cicero is thinking of the election of Clodius to the tribuneship, and hence the comitia he refers to are the assembly of plebs. In *Fam.* viii. 4. 3, "aedilium plebis comitiis" must refer to the plebeian assembly, in which the plebeian aediles were elected.² Another important passage is *Sest.* 51. 109:

"I come now to the comitia whether for electing magistrates or for enacting laws. We often see laws passed in great numbers. I say nothing of those which are enacted in such a manner that scarcely five of each tribe, and those not from their own tribe, voted for them. He (Clodius) says that at the time of that ruin of the republic he carried a law concerning me, whom he called a tyrant and the destroyer of liberty. Who is there who will confess that he gave a vote when this law was passed against me? But when in compliance with the same resolution of the senate, a law was passed about me in the comitia centuriata, who is there who does not profess that then he was present, and that he gave a vote in favor of my safety? Which cause, then, is the one which ought to appear popular? That in which everything that is honorable in the city, and every age, and every rank of men agree? Or that to the carrying of which some excited furies fly as if hastening to a banquet on the funeral of the republic?"³

The law which Cicero dwells on with such bitterness at the beginning of this passage and recurs to at the end is the tribunician law which pronounced on him the sentence of exile; in this connection, therefore, comitia distinctly includes the plebeian assembly in its legislative capacity.

Even more telling is *Leg.* iii. 19. 44-45:

"They (our ancestors) forbade the enactment of laws regarding particular persons except by the comitia centuriata. For when the people are organized

¹ "Permagni nostra interest te, si comitiis non potueris, at, declarato illo, esse Romae."

² Cf. Mommsen, *Röm. Staatsr.* ii. 482.

³ "Venio ad comitia, sive magistratum placet sive legum. Leges videmus saepe ferri multas. Omitto eas, quae feruntur ita, vix ut quini, et ii ex aliena tribu, qui suffragium ferant, reperiantur. De me, quem tyrannum atque ereptorem libertatis esse dicebat illa ruina rei publicae, dicit se legem tulisse. Quis est, qui se, cum contra me ferebatur, inisse suffragium confiteatur? cum autem de me eodem ex senatus consulto comitiis centuriatis ferebatur, quis est, qui non profiteatur se adfuisse et suffragium de salute mea tulisse? Utra igitur causa popularis debet videri, in qua omnes honestates civitatis, omnes aetates, omnes ordines una mente consentiunt, an in qua furiae concitatae tamquam ad funus rei publicae convolant?"

according to wealth, rank, and age, they use more consideration in giving their votes than when summoned promiscuously by tribes. In our case, therefore, a man of great ability and of consummate prudence, Lucius Cotta, truly insisted that no act whatever had been passed regarding us; for in addition to the fact that those comitia had been held wholly under the fear of armed slaves, the comitia tributa could not legally pass capital sentences or privilege. Consequently there was no need of a law to reinstate us, against whom exile had not been legally pronounced. But it seemed better both to you and to other most illustrious men that all Italy should show what it felt concerning that same person against whom some slaves and robbers declared they had passed a decree."¹

Cicero is here contrasting the comitia centuriata, which recalled him, with the tribal assembly of the plebs, which pronounced the sentence of exile. Now as he was condemned by the plebeian assembly, it is clear that in this passage Cicero calls the plebeian assembly comitia. How Mommsen² can make this citation refer to his "patricio-plebeian" comitia tributa no one can possibly explain. In *Att.* iii. 12. 1, comitia expressly includes the tribunician elections. The same elections are twice called comitia in *Att.* iii. 14; and in iii. 13. 1, Cicero, again mentioning these comitia, says: "In tribunis plebis designatis reliqua spes est." From all these passages it becomes evident that Cicero regards the plebeian assembly as comitia. In many passages comitia seems to include all the elections of the year, of plebeian as well as of patrician magistrates; for the elections were usually held in the same season, and could not well be separated in thought.³ In fact, according to Cicero's usage, comitia includes all kinds of national assemblies which do not come under the term contiones; cf. *Sest.* 50. 106:

"In three places can the judgment and the will of the Roman people be best discovered, in contio, in comitia, and in the gathering for the festivals and the gladiatorial shows."⁴ Cf. also 54. 115; 59. 125.

¹ "Ferri de singulis nisi centuriatis comitiis noluerunt. Descriptus enim populus censu, ordinibus, aetatibus plus adhibet ad suffragium consilii quam fusa in tribus convocatus. Quo verius in causa nostra vir magni ingenii summaque prudentia, L. Cotta, dicebat nihil omnino actum esse de nobis; praeter enim quam quod comitia illa essent armis gesta servilibus, praeterea neque tributa capitis comitia rata esse posse neque ulla privilegii: quocirca nihil nobis opus esse lege, de quibus nihil omnino actum esset legibus. Sed visum est et vobis et clarissimis viris melius, de quo servi et latrones scivisse se aliquid dicerent, de hoc eodem cunctam Italiam quid sentiret, ostendere."² *Rom. Forsch.* i. 161, n. 53.

³ See list of citations for electoral assemblies, p. 133.

⁴ "Tribus locis significari maxime populi Romani iudicium ac voluntas potest, contione, comitiis, ludorum gladiatorumque consessu."

The very phrase *comitia populi* (*Rep.* ii. 32. 56; *Div.* ii. 18. 42) implies the existence of other *comitia*, for instance *comitia plebis*. It is not strange, therefore, that Cicero should use the following expression; *Rep.* i. 33. 50: "The nobles who have arrogated to themselves this name, not with the consent of the people, but by their own *comitia*." ¹ Here he makes it evident that there may be *comitia* of the nobles in contrast with the "consent of the people." Should the senate usurp the elective function, Cicero would not hesitate to call that small body *comitia*, as appears from his ironical expressions in *Phil.* xi. 8. 19 ("Quod si *comitia* placet in senatu haberi" and "Quae igitur haec *comitia*"), in which he anticipates imperial usage; cf. *Vell.* ii. 124; *Tac. Ann.* i. 15.

Furthermore he speaks of *comitia*, consisting of but seventeen tribes, for the election of sacerdotes; *Cacl.* 8. 19; *Leg. Agr.* ii. 7. 18; *Ad Brut.* i. 5. 3 f.; 14. 1; *Fam.* viii. 12. 4; 14. 1.

From his point of view, a tribal assembly of the whole people was one which consisted of all thirty-five tribes, irrespective of the number present in the several tribes, irrespective, too, of the rank of those who attended. An assembly *tributim* of a part of the people, on the other hand, was one in which some of the tribes were unrepresented. All this is clearly expressed in *Leg. Agr.* ii. 7. 16 f. :

"For it orders the tribune of the plebs who has passed this law to elect ten decemvirs by the votes of seventeen tribes in such a way that he shall be decemvir whom nine tribes (a majority of the seventeen) have elected. Here I ask on what account he (the proposer of the law) has made a beginning of his measures and statutes in such form as to deprive the Roman people of their right to vote. . . . For since it is fitting for every power, command, and commission to proceed from the entire Roman people, those especially ought to do so which are established for some use or advantage of the people, in which case they all together choose also the man who they think will look out more carefully for the interest of the Roman people, and each one by his own zeal and his own vote assists to make a road by which he may obtain some individual benefit for himself. This is the tribune to whom it has occurred, more than to any one else, to deprive the entire Roman people of the right to vote, and to summon a few tribes, not by any fixed legal condition, but by the favor of sortition, to usurp the liberty of all." ²

¹ "Qui (optimates) non populi concessu, sed suis comitiis hoc sibi nomen adrogaverunt."

² "Iubet enim tribunum plebis, qui eam legem tulerit, creare decemviros per tribus septemdecim, ut, quem novem tribus fecerint, is decemvir sit. Hic quaero, quam ob causam initium rerum ac legum suarum hinc duxerit, ut populus Romanus suffra-

Even if the tribes were represented by no more than five men each, and these men not voting in their own tribes, the assembly was nevertheless *comitia tributa populi*.¹ This distinction — recognized by Cicero and his contemporaries — between an assembly of the whole people as represented by all the voting divisions and an assembly of a part of the people as represented by some of the voting divisions, is incompatible with the distinction formulated by Laelius. Though an antiquarian might make much of the presence or absence of a few patricians, a man who lived in the present, as did Cicero, probably never troubled himself about such unpractical matters.²

From the evidence as to Cicero's usage given above, we must draw the following conclusions :

1. He often uses *comitia* to denote the plebeian tribal assembly, just as Livy does.
2. He regularly uses *comitia* to denote the assembly of seventeen tribes for the election of sacerdotes. In this respect his usage is the same as Livy's.
3. He is ready to call the senate *comitia*, should it usurp the elective function — an anticipation of imperial usage.
4. His distinction between an assembly of the whole people and an assembly of a part of the people is incompatible with the definition of Laelius.

Concilium is comparatively rare in Cicero's works. In a few cases he seems to make *concilia* include all kinds of organized national gatherings; cf. *Rep.* vi. 13 (3). 13: "Nihil est enim illi principi deo . . . acceptius quam *concilia coetusque hominum iure sociati*, quae civitates appellantur (Nothing is more agreeable to the Supreme Being than assemblies and gatherings of men which are joined in societies by law and which are called states"); *Fin.* iii. 19. 63: "Natura sumus apti ad coetus, *concilia*, civitates." In the first citation *concilium* must, and in the second it may, include all the citizens. Cicero could hardly mean that we are by nature adapted to assemblies of a part of

gio privaretur . . . Etenim cum omnes potestates, imperia, curationes ab universo populo Romano proficisci convenit, tum eas profecto maxime, quae constituuntur ad populi fructum aliquem et commodum, in quo et universi deligant, quem populo Romano maxime consulturum putent, et unus quisque studio et suffragio suo viam sibi ad beneficium impetrandum munire possit. Hoc tribuno plebis potissimum venit in mentem, populum Romanum universum privare suffragiis, paucas tribus non certa condicione iuris, sed sortis beneficio fortuito ad usurpandam libertatem vocare; " cf. *Imp. Pomp.* 15. 44; 22. 64.

¹ *Sest.* 51. 109.

² P. 301 f.

the people, or that nothing could be more satisfactory to the Supreme Being than the concilium plebis which interdicted him from fire and water. In *Fin.* ii. 24. 77 ("To me those sentiments seem genuine which are honorable, praiseworthy, and creditable, which may be expressed in the senate, before the people, and in every gathering and concilium") he could not be thinking simply of the plebeian assembly, for he placed far greater value on the opinions expressed in and by the comitia centuriata.¹

From all that has been said it is evident that Cicero's usage as well as Sallust's does not differ from that of Livy. In fact no variation can be found in all the extant literature of the republic.² But it may be asked whether there was not a juristic tradition separate from the literary and preserving from early time the true distinction between the two words under discussion. A negative answer is compelled by the fact that history had its origin with jurisprudence in the pontifical college, that from the beginning historian and jurist were often united in the same person.³ Hence the juristic usage was the same as the literary. It is thoroughly established, therefore, that in the late republic, as well as in the early empire, the distinction between comitia and concilium was not a distinction between the whole and a part; in fact, it becomes doubtful whether the definition of Laelius was known to the writers of this period.

The results thus far reached are of great importance; the definition of comitia and concilium formulated by Laelius has been set aside, and the ground prepared for the establishment of new definitions by induction. From the material afforded by the authors under discussion, the following conclusions relative to the general uses of the two words may be drawn:

¹ "Mihi quidem eae verae videntur opiniones, quae honestae, quae laudabiles, quae gloriosae, quae in senatu, quae ad populum, quae in omni coetu concilioque profitendae sint;" cf. *Leg.* iii. 19. 44, quoted p. 127.

² The writers not included in this discussion, as Nepos and the poets, contain nothing at variance with the results here reached. Gudeman's article on Concilium in the *Thes. ling. lat.* iv. 44-8, in most respects excellent, still retains the groundless distinction between republican and imperial usage.

³ It will suffice here to mention the elder Cato; Livy xxxix. 40. 6: "Si ius consuleres, peritissimum;" Cic. *Senec.* 11. 38: "Ius augurium, pontificium, civile tracto." On the subject in general, see Pais, *Stor. d. Rom.* I. i. 68 and notes.

I. (a) The phrases *comitia curiata*, *comitia centuriata*, *comitia tributa* constantly occur; whereas (b) the phrases *concilium curiatum* (or -tim), *concilium centuriatum* (or -tim), *concilium tributum* (or -tim) cannot be found.

(a) The former is too well known to need illustration; (b) the latter may be sufficiently established by an examination of the references for *concilium* given in this chapter.

II. (a) *Concilium* may apply to a non-political as well as to a political gathering; (b) *comitia* is wholly restricted to the political sphere.

(a) *Concilium* is non-political in Cicero, *Div.* i. 24. 49 (*deorum concilium*); *Tusc.* iv. 32. 69; *N. D.* i. 8. 18; *Off.* iii. 5. 25; 9. 38; *Senec.* 23. 84; *Fin.* ii. 4. 12 (*virtutum concilium*); *Rep.* i. 17. 28 (*doctissimorum hominum in concilio*); *Sest.* 14. 32 (applied to the meeting of a collegium); Livy i. 21. 3 (*Camenerum concilia*); ii. 38. 4; xxvii. 35. 4.¹

III. Within the political sphere, again, (a) *concilium* is the more general term, — it suggests neither organization nor lack of organization; whereas (b) *comitia* is restricted to the organized assembly.

(a) *Concilium* is the more general term in Cicero, *Fin.* iii. 19. 63; ii. 24. 77; *Rep.* vi. 13 (3). 13.² In all these citations *concilia*, denoting assemblies of the whole people, must certainly include organized meetings, without excluding the unorganized. In *Leg.* iii. 19. 42 ("Invito eo qui cum populo ageret, seditionem non posse fieri, quippe cui liceat *concilium*, simul atque intercessum turbarique coeptum sit, dimittere") *concilium* is probably the organized assembly. On the other hand, the *concilium* of all the people mentioned by Livy, i. 8. 1, may have been unorganized.

IV. Within the province of organized national gatherings, on the other hand, (a) *comitia* is the wider term, applying as it does to all assemblies of the kind, whatever their function; whereas (b) *concilium* as an organized national assembly is wholly restricted to legislative and judicial functions.³

¹ For citations of other authors, see Gudeman, in *Thes. ling. lat.* iv. 45.

² All three passages are quoted, p. 130 f.

³ The classification of comitial functions into elective, legislative, and judicial follows Cicero, *Div.* ii. 35. 74: "Ut comitorum vel in iudiciis populi vel in iure

(a) Comititia is used in its most general sense in Cicero, *Div.* i. 45. 103; ii. 18. 42 f.; 35. 74; *Tusc.* iv. 1. 1.¹

V. (a) Applied to foreign institutions, comitia always designates electoral assemblies; (b) as at Rome, concilia are always legislative or judicial assemblies.²

(a) Comititia is used of foreign states in :

Caesar, *B. G.* vii. 67; Cicero, *Verr.* II. ii. 52. 128 (three occurrences), 129, 130; 53. 133; 54. 136; *Fam.* viii. 1. 2; Livy v. 1. 1; xxiv. 23. 1; 26. 16; 27. 1; xxxii. 25. 2; xxxiii. 27. 8; xxxiv. 51. 5.

(b) Foreign concilia are mentioned by :

Caesar, *B. G.* i. 18, 19, 30, 31, 33; iii. 18; v. 2, 6, 24, 56 f.; vi. 3, 20; vii. 1, 14, 15, 63, 75, 89; viii. 20 (Hirtius); Sallust, *Hist.* ii. 22; Nepos, *Tim.* iv. 2; Livy i. 6. 1; 50-52; iii. 2. 3; 10. 8; v. 1. 8; 17. 6; 36. 1; vi. 10. 7; vii. 25. 5; viii. 3. 10; ix. 45. 8; x. 10. 11; 12. 2; 13. 3; 14. 3; xxi. 14. 1; 19. 9, 11; 20. 1; xxiv. 37. 11; xxvi. 24. 1; xxvii. 9. 2; 29. 10; 30. 6; xxix. 3. 1, 4; xxxi. 25. 2; 29. 1, 2, 8; 32. 3, 4; xxxii. 10. 2; 19. 4, 5, 9; 20. 1; 21. 2; 22. 3, 9, 12; xxxiii. 1. 7; 2. 1, 7; 3. 7; 12. 6; 16. 3, 5, 8; xxxiv. 41. 5; 51. 5; xxxv. 25. 4; 27. 11; 31. 3; 32. 3, 5; 33. 1, 4; 34. 2; 43. 7; 48. 1; xxxvi. 6. 3; 8. 2; 26. 1; 28. 7, 9; 31. 9, 10; 32. 9; 34. 1; 35. 7; xxxviii. 9. 11; 10. 2; 31. 1; 32. 3; 34. 5; 35. 1; xxxix. 33, 35, 36, 37, 48, 50; xli. 24; xlii. 6, 12, 38, 43, 44, 47; xliii. 17; xlv. 18. Most of these concilia are known to have been assemblies of the whole people, noble and common.³

VI. In the Roman state, in a great majority of cases comitia are electoral assemblies; in fact, the word may generally be understood to signify that kind of assembly, or simply elections, unless the context indicates a different meaning.

Comitia are electoral in :

Caes. *B. C.* i. 9; iii. 1, 2, 82; Sall. *Cat.* 24; *Jug.* 36, 37; Cic. *Imp. Pomp.* 1. 2; *Leg. Agr.* ii. 7. 18; 8. 20; 10. 26; 11. 27; 12. 31; *Mil.* 9. 24, 25; 15. 41; 16. 42; *Mur.* 1. 1; 17. 35; 18. 38; 19. 38; 25. 51; 26. 53; *Phil.* ii. 32. 80, 81; 33. 82; 38. 99; viii. 9. 27; xi. 8. 19; *Planc.* 3. 7, 8; 4. 9, 10; 6. 15;

legum vel in creandis magistratibus." In this volume, accordingly, "legislative" refers not merely to lawmaking in the narrower sense, but also to the passing of resolutions on all affairs, domestic and foreign, including necessarily the *lex de bello indicendo*.

¹ For separate lists of the elective and the legislative and judicial comitia, see VI (below), where will be found sufficient illustrations of (b).

² Only one instance of concilium as an elective body has been found; *Lex Iulia Municipalis*, in *CIL.* i. 206. 132: the election of magistrates "comiteis conciliove." The explanation is that the usage of some of the Italian municipia differed from the Roman, and the author of the law had to adapt his language to local custom. With this exception the inscriptions are in line with the literature. ³ P. 124.

8. 21; 20. 49, 50; 22. 53, 54; *Verr.* 1. 6. 17; 7. 19; 8. 22, 23; 9. 24, 25; 18. 54; II. i. 7. 19; *Frag. A.* vii. 48; *Rep.* ii. 13. 25; 17. 31; 31. 53; *Att.* i. 1. 1, 2; 4. 1; 10. 6; 11. 2; 16. 13; ii. 20. 6; 21. 5; 23. 3; iii. 12. 1; 13. 1; 18. 1; iv. 2. 6; 3. 3, 5; 13. 1; 17. 7; 19. 1; xii. 8; *Ad Brut.* i. 5. 3; 14. 1; *Fam.* i. 4. 1; vii. 30. 1; viii. 2. 2; 4. 3; 14. 1; x. 26; *Q. Fr.* ii. 1. 2; 2. 1; 11. 3; 15. 3; iii. 2. 3; 3. 2; Varro, *R. R.* iii. 2. 1; Nepos, *Att.* v. 4; Livy i. 32. 1; 35. 1; 60. 4; ii. 8. 3; 56. 1, 2; 58. 1; 60. 4, 5; iii. 6. 1; 19. 2; 20. 8; 24. 9; 30. 6; 34. 7; 35. 1, 7, 8; 37. 5, 6; 39. 8; 51. 8; 54. 9, 11; iv. 6. 9; 16. 6; 25. 14; 35. 6; 36. 4; 41. 2; 44. 1, 2, 5; 50. 8; 51. 1; 53. 13; 54. 8; 55. 4, 8; 56. 1; 57. 9; v. 9. 1, 8; 10. 10; 14. 1; 31. 1; vi. 1. 5; 22. 7; 35. 10; 36. 3, 9; 37. 4; 39. 5; 42. 9, 14; vii. 9. 4; 17. 10, 13; 19. 5; 21. 1; 22. 7, 11; viii. 3. 4; 13. 10; 16. 12; 20. 1; 23. 11, 14, 17; ix. 7. 12, 14; x. 5. 14; 11. 3; 15. 7; 16. 1; 21. 13; 22. 8; xxi. 53. 6; xxii. 33. 9, 10; 34. 1, 3, 9; 35. 2, 4; xxiii. 24. 3; 31. 7, 12; xxiv. 7. 11; 9. 5, 9; 10. 2; 11. 6; 43. 5, 9; xxv. 2. 3, 5; 5. 2; 7. 5; 41. 10; xxvi. 2. 2; 18. 4; 22. 2; 23. 1, 2; xxvii. 4. 1; 8. 1; xxviii. 10. 1, 4; 38. 11; xxix. 10. 1, 2; 11. 9, 10; xxx. 40. 5; xxxi. 49. 12; 50. 6; xxxii. 7. 8, 12; 27. 5, 6; xxxiii. 21. 9; xxxiv. 42. 3, 4; 44. 4; 53. 2; xxxv. 6. 2; 8. 1; 10. 1, 9; 20. 7; 24. 3; xxxvi. 45. 9; xxxvii. 47. 1, 6; xxxviii. 35. 1; 42. 1, 2, 4; xxxix. 6. 1; 23. 1; chs. 32, 39, 40, 41, 45; xl. 18, 37, 45, 59; xli. 6, 8, 14, 16, 17, 18, 28; xlii. 9, 28; xliii. 11, 14; xlv. 17.

Comitia are legislative or judicial in :

Cic. Dom. 28. 75; 30. 79; 32. 86; 33. 87; *Har. Resp.* 6. 11; *Mil.* 3. 7; *Phil.* i. 8. 19; x. 8. 17; xiii. 15. 31; *Pis.* 15. 35, 36; *Red. in Sen.* 11. 27; *Sest.* 30. 65; 34. 73; 51. 109; *Leg.* iii. 19. 45; *Rep.* ii. 31. 53; 35. 60; 36. 61; *Att.* i. 14. 5; ii. 15. 2; iv. 1. 4; xiv. 12. 1; Livy iii. 13. 9; 17. 4; 20. 7; 24. 17; 29. 6; 55. 3; vi. 36. 9; viii. 12. 15; xxv. 4. 6; xxvi. 3. 9, 12; xxxi. 6. 3, 5; xxxiv. 2. 11; xlii. 30; xliii. 16; xlv. 35.

As these lists are nearly exhaustive, they represent substantially the relative frequency of the two uses of comitia.

VII. (a) Rarely is either the centuriate assembly or the so-called patricio-plebeian tribal assembly termed concilium; (b) the plebeian tribal assembly is rarely termed comitia except when electoral.

The principal instances of the rare use of concilium under (a) are Livy i. 26. 5; 36. 6; iii. 71. 3; vi. 20. 11.¹ (b) In its legislative or judicial capacity the plebeian tribal assembly is called comitia in Cicero, *Leg.* iii. 19. 45; *Sest.* 51. 109; Livy iii. 13. 9; 17. 4; vi. 36. 9; xxv. 4. 6; xxxiv. 2. 11; xlv. 35.

This classification covers without exception all the cases in the authors under discussion. An attempt may now be made to trace the development of these uses.

¹ Discussed on p. 123 f.

The first thing to be considered is that whereas concilium is singular, comitia is plural. Undoubtedly it is a plural of the parts of which the whole is composed; in other words, the curiae, or centuries, or tribes were originally thought of as little assemblies, whose sum total formed the comitia. Comitia therefore always has reference to the parts — the voting units — of which the assembly is composed, whereas concilium as a singular views the assembly without reference to its parts. For this reason, whenever it is advisable to add a modifier to indicate the kind of organization of the assembly, comitia is always used. We find, accordingly, comitia curiata, comitia centuriata, and comitia tributa in common use, but never concilium curiatum (or -tim), concilium centuriatum (or -tim), or concilium tributum (or -tim). These last expressions, which are modern inventions, do not accord with the Roman way of viewing the assemblies. This consideration satisfactorily explains the first general use.¹

As a non-political gathering is not made up of groups — similar to the voting divisions of the national assemblies — it cannot be called comitia. Concilium is the only term appropriate to it; hence we have the second general use of the two words.²

The same consideration makes concilium the more general term within the political sphere; the assembly it designates may be organized or unorganized, whereas comitia applies only to assemblies organized in voting divisions. This is the third general use.³

For explaining the four remaining uses it is necessary to inquire into the fundamental meaning of concilium. Although the etymology is uncertain, probability favors the ancient conjecture which derives it from "con-calare."⁴ People could only

¹ P. 132.

² Ibid.

³ Ibid.

⁴ Fest. ep. 38: "Concilium dicitur a concalando, id est vocando." It is accepted by Curtius, *Griech. Etym.* 139; Vaniček, *Griech.-lat. etym. Wörterb.* 143; Walde, *Lat. etym. Wörterb.* 136. But Corssen, *Beitr. z. ital. Sprachk.* 41 f., rejects this etymology on the ground that it does not harmonize with all the meanings of the word and of its derivative "conciliare"; also Gudeman, in *Thes. ling. lat.* iv. 44. Corssen, analyzing it into con-cil-iu-m, and connecting -cil- with a root kal-, "to cover," supposes the original meaning to be simply "a joining together," "a union," — giving that signification which he considers primary. It is equally reasonable, however, to assume the development to be (1) "a calling together," (2) "a meeting for consultation," (3) "a natural union of individuals of any kind." In the third sense it is applied perhaps figuratively to inanimate things, especially the union of atoms to form objects, by Lucretius i. 183, 484, 772, 1082; ii. 120; iii. 805; cf. Ovid, *Mét.* i. 710.

be called together for a purpose, which would most naturally be conversation, discussion, deliberation. Whatever may have been its origin, concilium certainly developed this meaning.¹ In the manuscripts and editions it is frequently interchanged with consilium,² and in the sources these two words are often placed in punning juxtaposition.³ Possibly their close resemblance, founded on no etymological connection of the roots, helped create in concilium the idea of deliberation. At all events in the prose authors of the period under discussion this is the primary meaning. The deliberative character of most non-political concilia is very evident.⁴ With this meaning the word could not designate an electoral assembly, which did not allow discussion;⁵ it was restricted to legislative and judicial assemblies, in which the voting was preceded by deliberation. This is the fourth use.⁶

Rarely did a Roman writer have occasion to mention an election in a foreign state. Whenever he did so, however, he always used comitia. Most of the business of foreign assem-

¹ The meaning consultation, deliberation, clearly appears in Plaut. *Mil.* 597 ff.:

"Sinite me priu' perspectare, ne uspiam insidiae sient
Concilium quod habere volumus. Nam opus est nunc tuto loco
Unde inimicus ne quis nostri spolia capiat consili.
Nam bene consultum inconsultumst, si id inimicis usuist,
Neque potest quin, si id inimicis usuist, opsit tibi;
Nam bene (consultum) consilium surripitur saepissime."

Also in 249, 1013: "Socium tuorum conciliorum et participem consiliorum"; Cic. *Rep.* 17. 28: "Doctissimorum hominum in concilio"; Caes. *B. C.* i. 19; Nep. *Epam.* 3. 5; Verg. *Aen.* ii. 89 (or consilis); iii. 679; v. 75; xi. 234; Livy I. 21. 3; see also II (a), p. 132, and Forcellini, *Lat. Lex.* ii. 347. It is never a chance crowd; *Diff.* ed. Beck, p. 47. 43: "Concilium est convocata multitudo, conventus ex diversis locis populum in unum contrahit, coetus fortuito congregatur." The ancients understood this to be the meaning of the word; Varro *L. L.* vi. 43: "A cogitatione concilium, inde consilium," an unsuccessful though instructive guess; Fest. ep. 38: "Concilium dicitur a populo consensu;" Isid. *Etym.* vi. 16. 12: "Concilium a communi intentione ductum, quasi communicilium." This interpretation is supported by several glosses; φιλοσοφία (*Corp. Gloss. Lat.* ii. 471. 49), συμβούλιον (ibid. ii. 107. 5), coenobulium, caenobulium (ibid. iv. 321. 27). Lastly our derivative "council" points in the same direction. The meaning "deliberative assembly" has been accepted by Gudeman, in *Thes. ling. lat.* iv. 46, who has added citations from the whole range of Latin literature.

² Lodge, *Lex. Plaut.* i. 288; Gudeman, *Thes. ling. lat.* iv. 45.

³ Cf. Gudeman, ibid. iv. 48.

⁴ Cf. n. 1 and p. 132, II (a).

⁵ P. 143.

⁶ P. 132.

blies referred to by Roman writers was concerned with international affairs — was legislative — and hence foreign assemblies are usually termed concilia.¹ This consideration accounts for the fifth general use.²

The sixth³ may be easily explained. The tendency was to restrict comitia to electoral assemblies, just as concilium was restricted to legislative and judicial assemblies, though this tendency never became a rule.

The seventh⁴ may be accounted for by the fact that after the passing of the Hortensian Law, the centuriate comitia came to be almost wholly electoral, while the plebeian tribal gathering became the chief statute-making body in the state. Furthermore the assembly over which the tribunes presided was far more deliberative than any other. Hence the centuriate assembly became *the* comitia, and the plebeian tribal assembly *the* concilium.⁵

The cause of the error into which Laelius⁶ fell is now apparent. Finding the plebeian tribal assembly frequently termed concilium and the centuriate assembly of the whole people generally termed comitia, he hastily concluded that comitia should be restricted to assemblies of the whole people and concilia to assemblies of a part of the people. This discussion has proved, against Laelius, that for the republic and for the age of Augustus the distinction between the two words was not a distinction between the whole and a part, and that all the uses of comitia and concilium in this period may be explained by two simple facts: (1) that whereas concilium is singular, comitia is plural; (2) that concilium suggests deliberation, discussion.

¹ The notion sometimes expressed that the word applies more appropriately to a body of representatives of the component states of a league is without foundation, though it is true that some foreign concilia are of this character.

² P. 133.

³ *Ibid.*

⁴ P. 134.

⁵ Thus is explained a phenomenon for which Mommsen could find no adequate reason — that the so-called "patricio-plebeian" tribal assembly was more apt to be called concilium than were the comitia centuriata. The deliberative feature of the concilium also explains the close approach of the word to contio — another fact which Mommsen knew but did not understand.

⁶ Cf. p. 131. Notwithstanding all the confidence reposed by the moderns in this utterance of Laelius, 'debet' suggests that he is proposing an ideal distinction rather than stating an actual usage.

A result of this inquiry is to banish the expressions "concilium tributum plebis" and "patricio-plebeian comitia tributa" — the former as impossible, the latter as unnecessary — from the nomenclature of Roman public law. There were but three forms of organized assembly — curiate, centuriate, and tribal — all equally entitled to the name "comitia." The difference between the "comitia tributa populi" and "comitia tributa plebis" was chiefly in the presidency, as will be shown in a later chapter.¹ Contio, on the other hand, denotes the listening or witnessing assembly, unorganized or organized but never voting, whereas concilium, overlapping contio and comitia, may include voting in addition to deliberation.

Mommsen, Th., *Röm. Forschungen*, i. 129-217; Berns, C., *De comitiorum tributorum et conciliorum plebis discrimine*; Soltau, W., *Altröm. Volksversammlungen*, 37-46; Humbert, G., *Comitia*, in Daremberg et Saglio, *Dict.* i. 1374 ff.; *Concilium*, *ibid.* 1432 f.; Liebenam, W., *Comitia*, in Pauly-Wissowa, *Real-Encycl.* iv. 679 ff.; Kornemann, E., *Concilium*, *ibid.* iv. 801 ff.; Vaglieri, D., *Concilium*, in Ruggiero, *Diz. ep.* ii. 566 ff.; see also indices s. Comitia, Concilium, in the works of Niebuhr, Schwegler, Lange, Mommsen, Marquardt, Willems, Herzog, etc. The authorities thus far named represent the usual theory as to the distinction between comitia and concilium based on the definition of Laelius Felix discussed in this chapter. A new view is presented by Botsford, G. W., *On the Distinction between Comitia and Concilium*, in *Transactions of the American Philological Association*, xxxv (1904). 21-32 — a paper reproduced with additions in the present chapter. See also Lodge, G., *Lexicon Plautinum*, i. 277 f. (Comitia), 289 (Concilium); Forcellini, *Totius Latinitatis Lexicon*, ii. 297 f. (Comitia), 347 f. (Concilium); Gudeman, *Concilium*, in *Thesaurus linguae latinae*, iv. 44-8.

¹ P. 286, 292, 301 f.

CHAPTER VII

THE CONTIO

CONTIO, derived from conventio,¹ originally signified "a coming together," "a meeting" of any kind. In an early stage of its history it must have been a general term for public assembly, especially comitia. This meaning appears most clearly in a passage of Macrobius,² in which, quoting the treatise of Lucius Julius Caesar on the Auspices, he declares (1) that on market days a contio cannot be called, (2) in other words, that on such days business cannot be transacted with the people, (3) that for this reason the Romans cannot hold comitia on market days. Cicero,³ too, states with reference to a certain market day that "for two days no contio can be held"—for the day of the market and the one following. From the context it is evident that he, like Macrobius, is thinking of comitia, which, as is well known, could not legally meet on market days.⁴ Doubtless in the conservative nomenclature of the pontiffs and augurs, quoted by Macrobius and Cicero, contio still included comitia; it must in fact have applied more particularly to the formal, voting assembly; for informal meetings were not forbidden on such days.⁵ But in the time of Cicero this use of the word was

¹ Corssen, *Ausspr.* i. 51; ii. 683; Vaniček, *Griech.-lat. etym. Wörterb.* 184; Walde, *Lat. etym. Wörterb.* 140; cf. *SC de Bacch.* in *CIL.* i. 196. 23: "In conventionid"; Fest. ep. 113: "In conventionem in contio"; *Commentaria Consularia*, in Varro, *L. L.* vi. 88; *Corp. Gloss. Lat.* v. 280. 13; vi. 270, s. v.

² *Sat.* i. 16. 29: "Contra Iulius Caesar XVI auspiciorum libro negat nundinis contionem advocari posse, id est cum populo agi, ideoque nundinis Romanorum haberi comitia non posse;" cf. p. 125 f.

³ *Att.* iv. 3. 4: "Contio biduo nulla."

⁴ Cf. Pliny, *N. H.* xviii. 3. 13: "Nundinis urbem revisitabant et ideo comitia nundinis habere non licebat, ne plebs avocaretur;" Fest. 173. 30-3.

⁵ Cic. *Att.* i. 14. 1; *Lex Gen.* 81, in *CIL.* ii. Supplb. 5439: "In contione palam luci nundinis." Another illustration is the statement of Gellius, xv. 27. 3, that wills were made in comitia calata, in a contio of the people. Mommsen's assumption (*Röm. Staatsr.* i. 199 and n. 3) that no contio was held on a market day as a rule,

obsolete excepting in the archaic formulae of the sacerdotal colleges. In the political language of his age *contio* had come to be restricted to the non-voting assembly — either organized¹ or more commonly unorganized — summoned by a magistrate or a *sacerdos*,² and in this sense it will be used in the present volume. Still farther removed from its origin is the meaning "oration" delivered to the people in such a gathering.³

Because of the passive character of this form of assembly the magistrate admitted all who wished to attend, without inquiring whether they were citizens and in full possession of their political rights.⁴ It might be composed either of soldiers⁵ or of civilians, presided over in the field by the commander, in the city by any magistrate who had a right to hold *comitia* in their own or in another's name, including the king,⁶ *interrex*, dictator, master of horse, and tribunes of the plebs;⁷ also the *quaestors*⁸

to which there were exceptions, is altogether unsatisfactory. The passages cited refer to a law, not to a mere custom to be observed or not at the will of the magistrate. The *contio* which met on a market day must have been essentially different in nature from the *contio* which was forbidden for market days; cf. also Varro, *L. L.* vi. 93; Cic. *Rab. Perd.* 4. 11.

¹ The *calata comitia curiata* is termed *contio* by Gell. xv. 27. 3: "Quod calatis comitiis in populi contione fieret." Cicero, *Rab. Perd.* 4. 11 (cf. 5. 15) speaks of the witnessing *comitia centuriata* as *contio*, and the *lustral centuriate* assembly was similarly termed; *Censoriae Tabulae*, in Varro, *L. L.* vi. 87: "Conventionem habet qui lustrum conditurus est." A widespread idea (held by Karlowa, *Röm. Rechtsgesch.* i. 379; Liebenam, in Pauly-Wissowa, *Real-Encycl.* iv. 1149; Soltau, *Altörm. Volksversamml.* 37, and others) that all *contiones* were unorganized is therefore wrong.

² Fest. ep. 38.

³ Cic. *Vatin.* i. 3; *Att.* xiv. 11. 1; 20. 3; xv. 2. 3; *Fam.* ix. 14. 7; x. 33. 2; Livy xxiv. 22. 1; Gell. xviii. 7. 6 f.; *Gloss. Corp. Lat.* ii. 114. 25; 269. 27; 575. 8.

⁴ P. 150.

⁵ Examples of military *contiones* are Caes. *B. G.* v. 48; vii. 52 f.; Livy i. 16. 1; ii. 59. 4 ff.; vii. 36. 9; viii. 7. 14; 31 f.; xxvi. 48. 13; xxx. 17. 9; xli. 10. 6; see also p. 202 f.

⁶ Dion. Hal. iv. 37; v. 11. 2; Plut. *Popl.* 3; the candidate, too, for the regal office; Livy i. 35. 2.

⁷ Cic. *Leg.* iii. 4. 10: "Cum populo . . . agendi ius esto consuli, praetori, magistro populi equitumque eique, quem patres proient consulum rogandorum ergo; tribunisque, quos sibi plebes creassit . . . ad plebem, quod oesus erit, ferunto;" Varro, *L. L.* vi. 93: "Censor, consul, dictator, *interrex* potest (exercitum urbanum vocare)."

⁸ Schol. Bob. 330; cf. Mommsen, *Röm. Staatsr.* I. p. xix. This passage proves that a *quaestor* could call a *contio* in his own right; and the same holds probable for the *aediles*.

and aediles,¹ the pontifex maximus and the rex sacrorum.² Necessarily the right belonged as well to all extraordinary magistrates, as the decemviri legibus scribundis, who possessed consular power within the city.³ But promagistrates and any others who held an exclusively military imperium could summon neither the comitia nor the civil contio.⁴ The censors held contiones for the taking of the census,⁵ for imposing fines,⁶ and for the lustration. In the last-named function the assembly was also called comitia centuriata or exercitus urbanus.⁷ The quaestors, the curule aediles, and the plebeian aediles exercised their jurisdiction in contiones and comitia, which for this purpose they called not in their own name but by permission of a higher magistrate.⁸

As the contio did not, like the comitia, theoretically include all the people, any number of magistrates could simultaneously hold meetings of the kind.⁹ A minor officer had no right to take charge of, or to summon the people from, a contio called by another. A higher officer exercised this right against a

¹ It is necessary to include them in the general statement of Messala, in Gell. xiii. 16 (17). 1, that the lower magistrates had the right; cf. the note above.

² Fest. ep. 38: "Contio significat conventum, non tamen alium, quam eum, qui a magistratu vel a sacerdote publico per praeconem convocatur." The sacerdos is the rex sacrorum as well as the supreme pontiff. It was necessary for the latter to hold judicial contiones; p. 259, 327. For the former, see Varro, *L. L.* vi. 28; Macrob. *Sat.* i. 15. 9-12; Serv. in *Aen.* viii. 654. Strictly the contiones of the rex sacrorum were calata comitia curiata; p. 155.

³ Mommsen, *Röm. Staatsr.* i. 193. For a contio of the Xviri leg. scrib. see Livy iii. 34. 1. On the duumviri for presiding at the election of consuls in 43, see Dio Cass. xlv. 45. 3. In the opinion of the Romans the tribunus celerum, an officer under the kings, possessed the right; Livy i. 59. 7; Dion. Hal. iv. 71. 6; 75. 1; Serv. in *Aen.* viii. 646; Pomponius, in *Dig.* i. 2. 2. 3: "Exactis regibus lege tribunicia." These authors suppose that L. Junius Brutus held an assembly in the capacity of tribunus celerum, whereas Cicero, *Rep.* ii. 25. 46, speaks of him as a private citizen.

⁴ Mommsen, *Röm. Staatsr.* i. 193. But the promagistrate had a right to attend and to address a contio called for him outside the walls by a competent person; cf. Vell. i. 10. 4; p. 426 below.

⁵ Varro, *L. L.* vi. 90.

⁶ Livy xliiii. 16. 5.

⁷ Varro, *L. L.* vi. 93.

⁸ For the quaestor, see *Com. Anq.* in Varro, *L. L.* vi. 91 f. For the curule aediles, Cic. *Verr.* i. 12. 36; v. 67. 173; Livy x. 23. 11; 31. 9; 47. 4; xxxv. 10. 11; 41. 9; Val. Max. vi. 1. 7; viii. 1. damn. 7; Pliny, *N. H.* xviii. 6. 42. For the plebeian aediles, Livy x. 23. 13; xxv. 2. 9; xxxiii. 42. 10; Gell. x. 6. 3; p. 290, 325 below; Mommsen, *Röm. Staatsr.* i. 196, n. 2 f.

⁹ Messala, *De Auspiciis*, in Gell. xiii. 16 (15). 1.

lower; the consul, for instance, could take the meeting from the hands of any ordinary patrician magistrate,¹ though not of a tribune of the plebs. No one dared disturb a meeting of any kind under the presidency of the latter,² and at least in the late republic a tribune sometimes forbade a patrician magistrate to address an assembly;³ but otherwise consuls and plebeian tribunes might hold simultaneous contiones.⁴

Sometimes the contio was summoned merely to witness a public act. The consuls called the people together outside the walls by the sound of the war-trumpet to see an execution for treason. On this occasion the citizens were arrayed in centuries on the Campus Martius, in an assembly called at once comitia centuriata and contio.⁵ We hear of a similar execution of an astrologer or magician outside the Esquiline gate, according to a primitive custom;⁶ and it was most probably in a contio that the supreme pontiff scourged to death a man who had wronged a Vestal.⁷ The people gathered in the same kind of meeting to witness an oath,⁸ a judicial process,⁹ or the levy of a fine.¹⁰ But it was preëminently the listening assembly, hence the definition offered by Gellius,¹¹ "To hold a contio is to address the people, without

¹ Messala, *De Auspiciis*, in Gell. xiii. 16 (15). 1.

² Dion. Hal. vii. 16. 4; 17. 5; 22. 2; x. 41; Cic. *Sest.* 37. 79; Livy iii. 11. 8; xxv. 3 f.; xliii. 16. 7-9; (Aur. Vict.) *Vir. Ill.* 65. 5; cf. Lange, *Röm. Alt.* i. 604, 826; p. 266 below.

³ Cic. *Fam.* v. 2. 7: Q. Metellus Nepos forbade Cicero to address the people in contio on the occasion of his retiring from the consulship—a prohibition which Cicero declares was never before heard of. For another case, see Dio Cass. xxxviii. 12. 3; Lange, *Röm. Alt.* ii. 716; iii. 299 f.

⁴ Lange's supposition (*Röm. Alt.* ii. 716) that by the holding of a contio a tribune could prevent a patrician magistrate's convoking comitia is not well founded. Livy, iv. 25. 1 ("Tribuni plebi adsiduiis contionibus prohibendo consularia comitia"), does not intend to express a constitutional principle; cf. Mommsen, *Röm. Staatsr.* ii. 289; Liebenam, in Pauly-Wissowa, *Real-Encycl.* iv. 1150.

⁵ Cic. *Rab. Perd.* 4. 11: "Tunc, qui civibus Romanis in contione ipsa carnificem, qui vincla adhiberi putas oportere, qui in Campo Martio comitiis centuriatis auspicato in loco crucem ad civium supplicium defigi et constitui iubes, an ego, qui funestari contionem contagione carnificis veto . . . qui castam contionem, sanctum Campum . . . defendo servari oportere;" cf. 5. 15.

⁶ Tac. *Ann.* ii. 32.
⁷ Fest. 241. 29; Livy xxii. 57. 3; Suet. *Dom.* 8; Dio Cass. lxxix. 9. 3 f.; cf. Mommsen, *Röm. Staatsr.* ii. 56, n. 4.

⁸ Cf. Livy xli. 15. 10; *Lex Gen.* 81, in *CIL.* ii. Supplb. 5439.

⁹ Livy iii. 66. 2; v. 11. 15; 12. 1; xxxviii. 52. 4; 53. 6. On the judicial contio, see p. 259.

¹⁰ Livy xliii. 16. 5.

¹¹ XIII. 16. 13.

calling on them for a vote." It applied not only to the isolated meeting summoned to hear edicts, reports, communications of every kind, including arguments and appeals for or against a given policy,¹ but also to the preparatory stage of the voting assembly whether addresses were delivered or not. Occasionally in early times there was speaking on the merits of candidates at the opening of an electoral assembly, and the voting was sometimes interrupted for the purpose.² Before the age of Cicero this rare proceeding had disappeared. In his day the canvass for candidates had been made before the holding of the preliminary contio, which accordingly was brief and formal. Because much time was required for the voting of the centuries,³ speaking on the day of their assembly had to be minimized. For this reason the contio for advising the adoption of a resolution by the comitia centuriata was held on an earlier day. Such was the meeting summoned in the Campus Martius by the consul P. Lentulus for the purpose of urging the people to vote in the ensuing centuriate assembly for the recall of Cicero.⁴ In judicial proceedings before any of the assemblies the testimonies of witnesses and the pleadings occupied the greater part of the time, and for this reason judicial assemblies were frequently termed simply contiones. They will be described in a later chapter.⁵

Informal contiones could be called at any time while the sun was up,⁶ with or without⁷ an interval between the summons and the meeting, and in any place⁸ at the pleasure of the person

¹ Cic. *Att.* ii. 21. 5; *Verr.* i. 15. 44; *Sest.* 12. 29; *Rep.* i. 4. 7; *Nep. Tim.* iv. 3; *Them.* i. 3; *Livy* ii. 2. 4; 24. 4-6; 27. 2; iii. 31. 2; 41. 5 ff.; 54. 6; 67 f.; iv. 15; xlii. 10. 13.

² *Livy* x. 13, 21; (Cic.) *Herenn.* iv. 55. 68. A contio, described by *Livy* vi. 39-41, was held by the tribunes Licinius and Sextius in the ninth year of their tribunate, after the day of election for the following year had been set. This meeting however was as much for the consideration of the proposed laws as of their own candidacy, and hence could not be thought of as strictly pertaining to the election. Mommsen's opinion (*Röm. Staatsr.* iii. 392, n. 1) that stories of the kind prove nothing does not accord with his own general attitude toward the sources for the earlier history of Rome.

⁴ Cic. *Sest.* 50. 107 f.; *Rea. in Sen.* 10. 26; *Pis.* 15. 34.

⁶ *Livy* xxxix. 17. 4 f.; *Plut. Aem.* 30; *Pseud. Sall. Declam. in Cat.* 19; cf. the *Twelve Tables*, in *Censorin.* 24. 3.

⁷ *Livy* xlii. 33. 2.

⁸ Besides the Forum or Comitium (*Dion. Hal.* ix. 41. 4) it sometimes met in the Area Capitolina (*Cic. Frag. A.* vii. 49; *Livy* xxxiii. 25. 6; xxxiv. 1. 4), or in the Circus

³ P. 470.

⁵ P. 259 f.

who convoked them. In public assemblies of every kind the people remained standing throughout the session.¹ The magistrate who was about to summon an auspicated contio repaired to the templum which he intended to occupy during the meeting.² After taking the auspices there, and finding the omens favorable, he ordered the crier to call the citizens.³ His directions to this assistant were prefaced by a solemn wish that the gathering of the citizens might be well, fortunate, auspicious, and advantageous to the Roman people, the commonwealth, himself, his colleague or colleagues, and his magistracy.⁴ After first issuing the summons from the templum the crier repeated it while making the circuit of the walls.⁵ Meantime the presiding officer invited the senators, his colleague or colleagues, and the various other magistrates to assist him with their presence and advice.⁶ The invitation was extended even to opposing tribunes;⁷ and on the other hand a presiding tribune was especially anxious to secure the presence and favorable influence of patrician magistrates and of the leading men of the state.⁸ When the president saw his friends about him and the people gathered, he called the contio to order,⁹ and proceeded to open the meeting with a

Flaminius (Livy xxvii. 21. 1; Cic. *Att.* i. 14. 1; *Sest.* 14. 33). In general, see Liebenam, in Pauly-Wissowa, *Real-Encycl.* iv. 1151; Karlowa, *Röm. Rechtsgesch.* i. 380.

¹ Cic. *Flacc.* 7. 16 (contrasting the sitting contio of the Greeks); *Brut.* 84. 289; *Leg. Agr.* ii. 5. 13; *Acad. Pr.* 47. 144; *Tusc.* iii. 20. 48; *Orat.* 63. 213. But probably the contio in the Flaminian circus was seated; Mommsen, *Röm. Staatsr.* iii. 396, n. 3.

² P. 107, 110. Although the tribune of the plebs did not auspicate their assemblies, they like other magistrates occupied a templum during the meeting; Livy ii. 56. 10.

³ *Censoriae Tabulae*, in Varro *L. L.* vi. 86. For the summons by the consul, see the *Commentaria Consularia*, ibid. 88; and by the quaestor, *Commentarium Acquisitionis* of M. Sergius, ibid. 91.

⁴ Varro, *L. L.* vi. 86.

⁵ *Censoriae Tabulae*, in Varro, *L. L.* vi. 87: "Praeco in templo primum vocat, postea de moeris item vocat;" cf. 90 f.; Livy xxxix. 32. 11; Cic. *Fam.* vii. 30. 1.

⁶ Documents, in Varro, *L. L.* vi. 86, 91.

⁷ Livy xxv. 3. 17; Cic. *Sest.* 50. 107 f.

⁸ Caesar, a praetor and friend of the presiding tribune, sat with him on the porch of the temple of Castor and Pollux — used on that occasion as the speaker's platform; Plut. *Cat. Min.* 27; Cic. *Vatin.* 10. 24: "In rostris, in illo, inquam, augurato templo ac loco . . . quo auctoritatis exquirendae causa ceteri tribuni pl. principes civitatis producere consuerunt."

⁹ Documents, in Varro, *L. L.* vi. 88, 91; cf. 93.

prayer.¹ In the case of a resolution to be brought before the assembly the magistrate was accustomed first to submit it to the senate, which considered the bill and perhaps suggested alterations;² but sometimes measures were brought into the comitia without this senatorial deliberation.³ In the contio the presiding officer had power to exclude or to limit discussion of his proposals. Ordinarily he found it advantageous to instruct the people regarding the subject on which they were to vote; and it was for this purpose that one or more contiones were held previous to the comitia. The right to address the people belonged primarily to the presiding magistrate. Although the king enjoyed the superior right, the notion that in the regal period no private persons spoke in the assembly seems to be unwarranted.⁴ The custom of the republic prescribed that the president should grant the privilege not only to his colleagues⁵ but also to all the

¹ Livy xxxix. 15. 1: "Consules in rostra escenderunt, et contione advocata cum solemnne carmen precationis, quod praefari, priusquam populus adloquantur, magistratus solent, peregisset consul, ita coepit: Nulli umquam contioni, quirites, tam non solum apta sed etiam necessaria haec sollemnis deorum comprecatio fuit." The prayer was made at the opening of elective as well as of deliberative assemblies (Cic. *Mur.* 1; Plin. *Paneg.* 63) by plebeian as well as by patrician magistrates; (Cic.) *Herenn.* iv. 55. 68. Every speech addressed to the people began with a prayer; Serv. in *Aen.* xi. 301; Cic. *Caecil.* 13. 43; Gell. xiii. 23. 1; Mommsen, *Röm. Staatsr.* iii. 390, n. 2.

² P. 430, 439.

³ Caesar first brought his agrarian bill before the senate; and calling on the senators one after another by name to say whether they found any fault with it, he promised to amend it or to drop it altogether, if any clause proved unsatisfactory to any member. As the senators would not debate the merits of the proposal, but did all they could to delay its consideration, he offered the bill to the assembly without their consent; and for the remainder of his consulship he brought no more bills before the senate, but referred them directly to the people; Dio Cass. xxxviii. 2-4; cf. p. 148.

⁴ Dion. Hal. v. 11. 2; Plut. *Popl.* 3. Besides the king it was supposed that the interrex and the tribunus celerum alone were competent; Dion. Hal. iv. 71. 6; 75. 1. The ancient writers seem to have been brought to this conception by a desire to contrast the despotism of the monarchy with the liberty of the republic. But according to Livy, i. 16. 5 ff., and Cicero, *Rep.* ii. 10. 20 (cf. Mommsen, *Röm. Staatsr.* i. 200, n. 6) Proculus Julius, a private person, made a speech in a contio of the regal period; and in judicial assemblies speaking by private persons was necessary; cf. Livy i. 26. For the general usage in the primitive European assembly, see p. 169.

⁵ In presenting his agrarian bill to the people Caesar first called on his colleague, despite the fact that the latter was known to be opposed to the measure; Dio Cass. xxxviii. 4. 1.

higher magistrates.¹ In some cases the invitation was extended to senators² and to other distinguished private persons.³ The tribunes sometimes gave the privilege to freedmen,⁴ to foreign kings,⁵ and to ambassadors.⁶ The early republic did not allow women to be present in political meetings;⁷ but in time this severity began to relax. Livy⁸ represents the elder Cato as saying that his generation permitted women to take part in affairs of state and to interfere in *contiones* and *comitia*—evidently an exaggeration, as the context proves that the women referred to did not actually come into the assembly, and the speaker intimates that custom disapproved of their doing so.

¹ *Commentarium Anquisitionis*, in Varro, *L. L.* vi. 91. Clodius, tribune of the plebs, brought forward the two consuls into the Flaminian circus, where they gave their sanction and formal approval of all the tribune had been saying against Cicero; Cic. *Sest.* 14. 33. On this occasion the consul Piso condemned Cicero's consulship for its cruelty; Cic. *Pis.* 6. 14; *Red. in Sen.* 6. 13. In 44 Cannutius, a tribune of the plebs, introduced into a *contio* the consul Mark Antony, who spoke regarding the assassins of Caesar; Cic. *Fam.* xii. 3. 2. Earlier instances are Livy iii. 64. 6; iv. 6. 1 f. A tribune brought the augurs into a *contio*, to ask of them information concerning the auspices; Cic. *Dom.* 15. 40.

² Although the senators were invited to sit on the platform (*Comm. Aug.* in Varro, *L. L.* vi. 91), speaking by them was exceptional; in the assembly they were no more than eminent private persons; Dio Cass. xxxviii. 4. 4; cf. ch. 5.

³ E.g. Cic. *Att.* iv. 1. 6: "Habui *contionem*. Omnes magistratus praesentes praeter unum praetorem et duos tribunos dederunt." In a certain *contio* a tribune asked Scipio Aemilianus what he thought of the conduct of Ti. Gracchus; Val. Max. vi. 2. 3. At the suggestion of the consul Piso, Fufius, a tribune, brought Pompey upon the platform and asked his opinion as to the selection of jurors for a particular case; Cic. *Att.* i. 14. 1; cf. Ascon. 50. The tribune M. Servilius invited Cicero to speak in a *contio* in support of C. Cassius (Cic. *Fam.* xii. 7. 1), and it was in response to an invitation of another tribune, P. Appuleius (*Phil.* vi. 1), that he delivered the sixth *Philippic*. Other references to tribunician invitations are Cic. *Att.* xiv. 20. 5; Dio Cass. xlv. 6. 3. ⁴ Ascon. 38. ⁵ Sall. *Iug.* 33 f.

⁶ The Rhodian ambassadors were introduced by the tribune Antony to the senate (Polyb. xxx. 4. 6), as the context (cf. § 8) indicates, not as Mommsen, *Röm. Staatsr.* ii. 313, n. 1, supposes, to the people. There is no question, however, as to the right of a magistrate to bring such persons before the popular assembly.

⁷ Val. Max. iii. 8. 6: "Quid feminae cum *contione*? Si patrius mos sevetur, nihil." The *lex Horatia*, which is alleged to have granted the Vestal Gaia Taracia among many honors the right to give testimony [Gell. vii (vi). 7. 1-3], and which is assigned by Cuq (*Inst. jurid. d. Rom.* i. 255; and in Daremb. et Saglio, *Dict.* iv. 1145) to the consul Horatius, 509, is a myth (Lange, *Röm. Alt.* ii. 608), though doubtless in the course of the republic laws of the kind were occasionally passed, the language of which might be quoted by the annalists (Gell. l. c.). The rule that women were *intestabiles* is proved by such exceptions. ⁸ XXXIV. 2. 11.

From the time of the Gracchi they occasionally spoke in public. Dio Cassius¹ states that Tiberius Gracchus brought his mother and children into a contio to join their entreaties with his; and according to Valerius Maximus² a tribune of the plebs required Sempronia, sister of the Gracchi, to come forward in a similar meeting and give her opinion on the subject under consideration. In the year 43 some ladies attended a contio to protest against being taxed by the triumvirs. Hortensia spoke for the complainants.³ It was an accepted custom that no tribune should intercede against a measure till an opportunity had been afforded private persons to speak for or against it.⁴ When after the victory of Pydna a tribune of the plebs had introduced a motion to grant a triumph to Aemilius Paulus, and the debate had been thrown open to the assembly, all for a time remained silent, for no doubt was entertained as to its passing; but finally Servius Galba, who as a military tribune had served under Paulus and was his enemy, came forward and obstructed the measure by a long harangue.⁵ Although the president could, and perhaps often did, throw the debate open to the citizens in this way, he was not compelled to do so. The tribunician assembly was more deliberative than any other—a circumstance which accounts for its designation as a concilium.⁶ Those invited to speak, if citizens, had to be of good standing and not under disqualification through a special law or usage. The rex sacrorum was prohibited not only from holding any other office but also from addressing an assembly.⁷ The spendthrift⁸ and the man condemned for extortion⁹ were likewise forbidden. When the right was granted as a special distinction, the receiver was probably placed thereby on a footing of equal dignity with the magistrates.¹⁰

¹ Frag. 83. 8.

² III. 8. 6.

³ Appian, *B. C.* iv. 32–4; see also p. 326.

⁴ Livy xlv. 21. 6; 36. 1.

⁵ Livy xlv. 36; cf. the statement of Dion. Hal. x. 41. 1, that on a certain occasion the crier invited all who wished to speak. These two passages are credible, notwithstanding the doubt expressed by Mommsen, *Röm. Staatsr.* iii. 395, n. 2, if we regard the general invitation as a concession on the part of the presiding magistrate rather than as a right of the people.

⁶ P. 136.

⁷ Plut. *Q. R.* 63.

⁸ Quint. *Inst.* iii. 11. 13: "Qui bona paterna consumpserit, ne contionetur."

⁹ (Cic.) *Herenn.* i. 11. 20; cf. *Lex Bant.* (133–118 B.C.) in *CIL.* i. 197. 2 f.

¹⁰ Such a grant in Alexandria Troas, mentioned by *CIL.* iii. 392, Mommsen (*Röm. Staatsr.* i. 201, n. 3) believes to have been in imitation of Roman usage.

The president could also compel a citizen to speak. The holder of the imperium had a right to summon any man into a public meeting, and order him to answer any question put to him.¹ Tribunes of the plebs, however, who lacked the power of summoning, exercised this coercive function against citizens and even consuls, not through a direct right but by a usurpation, probably based on their power to arrest and imprison.²

The president extended permission by asking a man to give his opinion on the subject under discussion, and it was not in good order even for a magistrate to address the assembly unless invited, though he had ground for resentment if he was passed over in favor of private persons.³ When Caesar as consul, 59, brought his agrarian bill before the comitia without the consent of the senate and in spite of its silent disapproval,⁴ he first asked his colleague whether he had any objection to the proposal. Bibulus offered none but declared that he would allow no innovation during his consulship. Thereupon Caesar begged him for support, and requested the people to join in the entreaty, saying, "You will have the law on the sole condition that he is willing." Then Bibulus, answering in a loud voice, "You will not have this law the present year, even if all of you want it," left the assembly. Slighting the other magistrates, Caesar invited Pompey and Crassus to address the meeting, though they were but senators and therefore, as contrasted with

¹ Varro, *Rer. hum.* xvi, in Gell. xiii, 12, 6.

² *Ibid.*; cf. Val. Max. iii, 7, 3: "C. Curatius tr. pl. productos in contionem consules compellebat ut de frumento emendo referrent." Mommsen's interpretation (*Rom. Staatsr.* ii, 313, n. 2), that the tribunes could not summon the consuls but could compel them to speak when present, is not altogether satisfactory. The comment of Gellius (§ 7 f.): "Huius ego iuris, quod M. Varro tradit, Labeonem arbitror vana tunc solucia, cum privatus esset, vocatum a tribunis non esse. Quae, malum, autem ratio fuit vocantibus nolle obsequi, quos contineat ius habere prendendi? Nam qui iure prendi potest, et in vincula duci potest") supports the view given above in the text. A magistracy might afford some degree of protection, but on the principle enunciated by Gellius the tribune, who had the power to arrest a consul, was in a position practically to compel him to appear at a public meeting. As further examples of the president's power to force speaking, Cato, a tribune of the plebs, compelled the keepers of the Sibylline books to come before the people in contio and declare the prophecy; Dio Cass. xxxix, 15, 4; cf. also Cic. *Vatin.* 10, 24; *Att.* ii, 24; Plut. *Cic.* 9; Dio Cass. xxxvi, 44, 1.

³ P. 146.

⁴ P. 145, n. 3.

magistrates, merely private citizens. After Pompey had spoken at length, commending the details of the law, Caesar asked if he would support it against opponents, at the same time requesting the people to beg of him this favor. They did so, doubtless by acclamation; and Pompey, greatly flattered because the consul and the people besought help of him, a private citizen, promised to stand by the law.¹

A magistrate spoke from the platform, a private person from a lower position, presumably from one of the steps; for the chairman to bring a private speaker upon the stage was a cause of offence to his colleagues.² When the president granted an opportunity to speak, he had a right to fix the amount of time to be used. In the debate on the law for assigning provinces to Caesar and Pompey, 55, the presiding tribune granted one hour to Favorinus and two hours to Cato, both opponents of the measure.³ The speaker could use the time in whatever way he pleased; a few persons by concert might waste the whole day in trivialities, as is sometimes done in the senate of the United States of America, so as to prevent voting on the subject for that date. In the case above mentioned Favorinus, doubtless for lack of real argument, exhausted his hour in lamentation over the shortness of the time allowed him,⁴ and Cato spent his two hours on irrelevant or minor matters, merely that he might be silenced by the president while still appearing to have something to say. He persisted in speaking accordingly till an officer dragged him from the rostra and ejected him from the Forum. Even then he returned several times to interrupt the proceedings with his shouting.⁵ If the speaker approved the measure, he might close with the words, "This law of yours and your purpose and sentiments I praise and most heartily approve";⁶ or more formally, "In my opinion

¹ Dio Cass. xxxviii. 2-5.

² Cic. *Att.* ii. 24. 3: "Caesar, is qui olim praetor cum esset, Q. Catulum ex inferiore loco iusserat dicere, Vettium in rostra produxit;" *Vatin.* 10. 24: "Cum L. Vettium . . . in contionem produxeris, indicem in rostris, in illo, inquam, augurato templo ac loco collocaris, quo auctoritatis exquirendae causa ceteri tribuni principes civitatis producere consuerunt."

³ Dio Cass. xxxix. 34. 2; Plut. *Cat. Min.* 43.

⁴ Or as Foster translates, "about the distressing condition of the times."

⁵ Dio Cass. xxxix. 34; Plut. *ibid.*

⁶ Cic. *Imp. Pomp.* 24. 69.

this bill as presented ought to be passed, and may it prove well, auspicious, and fortunate both to yourselves and to the republic";¹ or if opposed to the proposition, he might conclude with this form of disapproval, "It is my judgment that this law should by no means be repealed."²

Sometimes the magistrates were invited in the order of their rank and afterward private citizens; in other cases, especially in tribunician contiones, private persons were called first that they might speak with perfect freedom, uninfluenced by the opinion of their magistrates.³ As the president had absolute control, he could alter the usage to suit his own interest, and could certainly reserve to himself the advantage of speaking last.⁴ It often happened that there was not enough time in one day for the discussion of a question. In that case the magistrate adjourned the meeting to a specified date.⁵

After the deliberation, or after the formality of opening the contio which was merely preliminary to the comitia, the president ordered the assembly to form into voting groups — curiae, centuries, or tribes. He could say, for instance, "I order you to take your proper places in the comitia centuriata,"⁶ or more generally, "If you think fit, quirites, move apart (into your voting groups)."⁷ At the same time he ordered the departure of all who lacked the qualification for voting.⁸ The lictors of the magistrates with imperium and the beadle (viator) of the tribune attended to clearing away the unqualified.⁹

¹ Livy x. 8. 12.

² Ibid. xxxiv. 4. 20.

³ Dio Cass. xxxix. 35. 1.

⁴ Ibid.

⁵ Livy ii. 56. 9: "Quirites, . . . crastino die adeste."

⁶ *Commentaria Consularia*, in Varro, *L. L.* vi. 88: "Impero qua convenit ad comitia centuriata."

⁷ Livy ii. 56. 12: "Si vobis videtur, discedite, quirites."

⁸ Preparatory to voting, the plebeian tribune Laetorius ordered the removal of all, including patricians, who were not to vote; Livy ii. 56. 10: "Submoveri Laetorius iubet praeterquam qui suffragium incant."

⁹ In the case referred to in the note above, some of the young patricians stood their ground and refused to give way before the viator; § 11; cf. Dion. Hal. ix. 48. Again on other occasions the patricians when ordered refused to withdraw before the voting (cf. Livy iii. 11. 4), from which we may infer that the right to attend the comitia presided over by tribunes was claimed by the patricians but denied them by the tribunes. The word used in these passages to designate the removal of the unqualified is "submovere." In Livy xxv. 3. 16 (cf. Cic. *Flacc.* 7. 15) "tribuni populum summoverunt" has reference to the adjournment of the people to their voting divisions, and probably also to the exclusion of those who had no right to vote; cf. Mommsen, *Röm. Staatsr.* iii. 390, n. 1.

Schulze, C. F., *Volksversammlungen der Römer*, 141 ff., 243 ff.; Rubino, J., *Röm. Verfassung und Geschichte*, 240-53; Lange, L., *Röm. Altertümer*, ii. 715-23, and see indices s. v.; Mommsen, Th., *Röm. Staatsrecht*, i. 191-209; iii. 370-8, and see index s. v.; Willems, P., *Droit public Rom.* 158 f.; Herzog, E., *Röm. Staatsverfassung*, i. 632-6, 1057 f., and see index s. v.; Karlowa, O., *Röm. Rechtsgeschichte*, i. 48 f., 379-81; Madvig, J. N., *Verf. u. Verw. d. röm. Staates*, i. 219; Soltau, W., *Altröm. Volksversammlungen*, 37 ff.; Humbert, G., *Contio*, in Daremberg et Saglio, *Dict.* i. 1484 f.; Liebenam, W., *Contio*, in Pauly-Wissowa, *Real-Encycl.* iv. 1149-53; Ruggiero, *Diz. ep.* ii. 1185, s. *Contio*; Lodge, G., *Lex. Plaut.* i. 307, s. *Contio*; Forcellini, *Tot. Lat. Lex.* ii. 349 f., s. *Concio*; Dupond, A., *Constitution et magistratures Rom.* 60-3; Ihne, *History of Rome*, iv. 40-2.

CHAPTER VIII

THE CALATA COMITIA

IN seeking for the origin and primitive character of the Roman assembly we are enabled by comparative study to reach a stage of growth far anterior to the beginnings of Roman tradition. In its earliest known form the European popular assembly had the following characteristics, provisionally enumerated here, but established in the next chapter: (1) the people who attended were the mass of freemen of a tribe, especially the warriors; (2) they stood or sat promiscuously, without reference to sub-tribal groups; (3) measures were proposed by none but chiefs or nobles, generally after previous discussion in council, the common members wholly lacking initiative; (4) the speakers were as a rule, though not exclusively, chieftains; (5) the vote was by acclamation, the clash of weapons, or some similar demonstration; as a correlate of (3) and (4) may be added, (6) sovereignty, so far as the idea existed, resided not in the assembly, which of itself could take no action, but in the king and chieftains, who made use of the assembly (*a*) for the publication of news or of projects, (*b*) for securing by their eloquence the coöperation of the tribe in a plan already formed in council. However far developed beyond this crude institution the comitia curiata or the comitia centuriata of the republican period may have been, traces of all the characteristics above mentioned may be found in the historical Roman assembly¹ — a fact which justifies the comparative method of approach to the subject.

We need not hesitate to begin with the unorganized contio as the earliest form of Roman assembly, to which we may attach the other features of the European gathering named above. The first problem is to determine under what influence and for

¹ Acclamation was retained as a regular form of voting by the army; p. 202; cf. Bernhöft, *Röm. Königsz.* 153.

what purpose the gathering of the people came to be organized in curiae. The notion that the object was primarily for voting is groundless. The Athenians had the germ of a tribal assembly in the division of the people by phylae on the occasion of ostracophory¹ and of the passing of other privilegia (νόμοι ἐπ' ἀνδρῶν). The organization was not in this case for the purpose of using the tribes as voting units, but merely for bringing order and solemnity to the proceeding. Apparently the assembly of Alamanni was arrayed in military form for ratifying emancipations,² though in the process the military companies did not vote as units. In like manner, but for a wider range of functions, we find at Rome the meeting of the people in curiae, less frequently in centuries, merely for listening, for witnessing, or for receiving purification. The circumstances that the business of such assemblies was largely religious, and of such a character that it must have originated in the earliest Roman times, and that in the greater number of cases these gatherings were under sacerdotal presidency suggest that the sacerdotess, particularly the pontiffs, introduced the curiate organization from the army to make their religious meetings more orderly and dignified.³

All assemblies which met under pontifical presidency for religious purposes were called calata,⁴ evidently from "calare," a verb which must originally have been in common use in the sense of "to call," but which in historical time was restricted to

¹ Philochorus, 79 b, in Müller, *Frag. Hist. Graec.* i. 396. The condemnation of the generals who fought at Arginusae was voted in the same way; Xen. *Hell.* i. 7. 9.

² Cf. Schröder, *Deutsche Rechtsgesch.* 16.

³ It is interesting in this connection that in the Homeric assembly the heralds (κῆρυκες), who were a sacerdotal class, kept order; cf. *Il.* ii. 97 f. In the German assembly the priests with coercive power maintained quiet; Tac. *Germ.* ii. 3; Schröder, *Deutsche Rechtsgesch.* 22 f. The Irish assemblies were of religious origin, and maintained some religious features till after the introduction of Christianity; Ginnell, *Brehon Laws*, 42, 44.

⁴ They excluded on the one hand comitia for religious purposes presided over by a political magistrate — for instance, the comitia centuriata under the censor for the lustrum (p. 141) — and on the other the meetings of the people under pontifical presidency for secular business, such as an appeal to the comitia from the pontifical imposition of fines (cf. Livy, xl. 42. 9), the meeting of the plebs under the supreme pontiff for the election of plebeian tribunes after the fall of the decemvirate (Cic. *Cornel.* in Ascon. 77; Livy, iii. 54. 5, 11), and the meeting of seventeen tribes for the election of sacerdotess. In the three exceptional instances last mentioned the comitia are tributa, which are never calata.

the technical language of the sacerdotes.¹ In the latter connection it designates the peculiar method of summoning used by the pontiffs.² Probably, at least in earlier time, their calatores acted as curiate lictors in convoking the calata comitia curiata,³ over which they presided. In all meetings of the kind in the regal period the people were grouped in curiae; under the republic the centuriata comitia calata were also used for certain purposes.⁴ The usual meeting-place of the calata comitia curiata was in front of the curia Calabra on the Capitoline Hill.⁵ With reference to their object, they may be classed as non-voting and voting; the former were purely religious, the latter were for the settlement of questions which were in part civil.⁶ First to be noted of the non-voting assemblies were those in which the people gathered in comitia under the presidency of the king,⁷ in the republic under the rex sacrorum, to hear the proclamation of the fasti. On the calends of each month a

¹ Kindred words are calendae, Calabra, calator. As late as Plautus (*Pseud.* 1009; *Merc.* 852; *Rud.* 335) a common use of calatores was to designate slave messengers; cf. *Fest.* ep. 38; *Corp. Gloss. Lat.* ii. 95. 42: δοῦλοι ἀγγελιστοί. This use became obsolete, but the word continued to apply to certain assistants of the sacerdotes; *Serv. in Georg.* i. 268; *Corp. Gloss. Lat.* ii. 96. 3; iv. 214. 1; v. 275. 1; 595. 34, 63; 563. 66; *CIL.* vi. 712, 2053. 5; 2184-90, 3878; x. 1726; also the *inscr.* recently discovered in the Forum; cf. Holzapfel, in *Jahresb. f. Altwiss.* 1905. 263, 265 ff.; Warren, in *Am. Journ. of Philol.* xxviii (1907). 249-72. In all the known instances they were freemen, often freedmen; Saglio, in Daremberg et Saglio, *Dict.* i. 814. For other citations, see Samter, in Pauly-Wissowa, *Real-Encycl.* iii. 1335 f. They correspond to the lictors of the magistrates.

² Varro, *L. L.* v. 13: "Nec curia Calabra sine calatione potest aperiri."

³ Saglio, in Daremberg et Saglio, *Dict.* i. 814; Humbert, *ibid.* i. 1375. But the comitia curiata were convoked by lictors according to Gell. xv. 27. 2: "Curiata (comitia) per lictorem curiatum calari, id est convocari"; Theophilus, *Paraphr. Inst.* ii. 10. 1. Possibly the lictor curiatus (or curiatus; *CIL.* iii. 6078) should in this case be identified with the calator.

⁴ Laheo, in Gell. xv. 27. 1 f.: "Calata comitia esse, quae pro collegio pontificum habentur aut regis aut flaminum inaugurandorum causa; eorum autem alia esse curiata, alia centuriata." From this statement we learn that the calate assemblies for inaugural purposes were organized either in curiae or in centuries. As "comitia" connotes organization (p. 135), we may be sure that in all calata comitia the people stood in their voting groups. On the centuriate comitia calata, see p. 156.

⁵ Varro, *L. L.* v. 13; vi. 27; *Fest.* ep. 49; *Macrob. Sat.* i. 15. 9 f.; *Fast. Praenest. Kal. Ian.*, in *CIL.* i. 2 p. 231; Jordan, *Top. d. Stadt Rom*, I. ii. 51; Rubino, *Rom. Verf.* 245, n. 1; Lange, *Röm. Alt.* i. 398 f.; Hülsen, in Pauly-Wissowa, *Real-Encycl.* iv. 1821. ⁶ Humbert, in Daremberg et Saglio, *Dict.* i. 1376.

⁷ He may have appointed a priestly substitute for such functions.

pontifex minor, as clerk of the college,¹ announced to them on what day, whether the fifth or seventh, the nones would come.² On the nones the king again summoned the people to hear the calendar of the month,³ read probably by the same pontifex minor. This custom fell into disuse with the publication of the calendar in the Forum, beginning in 304.⁴

Equally passive were those comitia calata which under the presidency of the supreme pontiff witnessed the inauguration of the three flamines maiores,⁵ probably of the king in the

¹ Livy xxii. 57. 3: "Scriba pontificis, quos nunc minores pontifices adpellant." That he acted in behalf of the college is proved by Varro, *L. L.* vi. 27 (note below).

² Varro, *L. L.* vi. 27: "Primi dies mensium nominati Kalendae, quod his diebus calantur eius mensis nonae a pontificibus, quintanae an septimanae sint futurae in Capitolio in curia Calabra"; *Hemerol. Praenest.* Ian. 1, in *CIL* i.² p. 231: "Hae et (aliae pri) mae calendae appellantur, quia (eorum pri) mus is dies est quos pont(i)fex minor quo(vis anni) mense ad nonas sin(gulas currere edicit in capi)tolio in curia cala(bra)"; Macrob. *Sat.* i. 15. 9 f.: "Pontifici minori haec provincia delegabatur, ut novae lunae primum observaret aspectum visamque regi sacrificulo nuntiaret. Itaque sacrificio a rege et minore pontifice celebrato idem pontifex calata, id est vocata in Capitolium plebe iuxta curiam Calabram . . . quot numero dies a Kalendis ad Nonas superessent pronuntiabat." Serv. in *Aen.* viii. 654 and Plut. *Q. R.* 24 are inexact, and still more confused is Lyd. *Mens.* iii. 7; cf. Mommsen, *Röm. Staatsr.* ii. 39, n. 1. In the opinion of Mommsen the announcement on the calends was not to an assembly, but was merely preparatory to the assembly on the nones; but the words of Macrobius (vocata . . . plebe) clearly indicate a gathering of the people on that day.

³ Varro, *L. L.* vi. 13, 28; Macrob. *Sat.* i. 15. 12; cf. Herzog, *Röm. Staatsverf.* i. 109 and n. 1. Mommsen, *Röm. Staatsr.* ii. 40, n. 2, warns us against confusing "this unorganized contio" with the comitia calata, which are always organized in curiae or in centuries. Labeo, in Gell. xv. 27. 1, states, however, that calata comitia were held for the inauguration of the king and priests. If for this occasion the purely passive assembly was organized in voting divisions, there can be no reason for doubting that it was organized also on the occasion in question, when it met in the assembly-place of the calata comitia — a place which could not be opened sine calatione — and its convocation was designated by "calare" not "vocare." It is significant that the phrase "calata contio" is never used. Mommsen gives no authority or reason for his assumption; cf. Lange, *Röm. Alt.* i. 398; Herzog, *Röm. Staatsverf.* i. 111; Marquardt, *Röm. Staatsv.* iii. 283, 323; Wissowa, *Relig. u. Kult. d. Römer*, 440, for the view here maintained that the assembly for hearing the calendar was calata.

⁴ Macrob. *Sat.* i. 15. 9.

⁵ For the inauguration of the flamen Dialis, see Gaius i. 130; iii. 114; Ulpian, *Frag.* 10. 5; Livy xxvii. 8. 4; xli. 28. 7; the flamen Martialis, Livy xxix. 38. 6; xlv. 15. 10; Macrob. *Sat.* iii. 13. 11; the flamen Quirinalis, Livy xxxvii. 47. 8; cf. Wissowa, *Relig. u. Kult. d. Römer*, 420, n. 3. The inauguration of augurs probably took place in their own college.

regal period, and certainly of the rex sacrorum under the republic.¹ As warlike Mars had his shrines outside the pomerium,² his chief temple being in the Campus Martius,³ it is a probable conclusion that his flamen was inaugurated there — in the regal period in some form of military assembly, under the republic in the comitia centuriata.⁴ The inaugural ceremonies were performed by an augur;⁵ in the case of the sacerdotes it was the supreme pontiff who requested this service of him,⁶ whereas the king could doubtless command an augur without the coöperation of the pontiff. A closely related function was the appointment of Vestals by lot, under the conduct of the supreme pontiff in a public assembly, probably the calata comitia.⁷ The destatio sacrorum and the abjuration of social rank, other acts which these comitia merely witnessed, will be considered in connection with the transitio ad plebem and the adrogatio.⁸ The ceremonies attended to by the rex sacrorum on March 24 and again on May 24 may have been in comitia calata, though this is doubtful.⁹

Assemblies of the people were organized in curiae by the pontiffs for the religious purposes mentioned above, while political measures, so far as submitted to the people, continued for a time, we may suppose, to be decided by din in contiones. But when a desire for a more precise vote began to be felt, the curiate organization naturally offered itself as most convenient for the purpose. The contention that in primitive Rome, as

¹ For the inauguration of the rex sacrorum, see Livy xxvii. 36. 5; xl. 42. 8. Livy's description of the inauguration of Numa (i. 18. 6-9) probably follows the historical usage in the case of the rex sacrorum.

² Serv. in *Aen.* vi. 859.

³ Aust, *Relig. d. Römer*, 130.

⁴ Mommsen, *Röm. Staatsr.* iii. 307, n. 1. This is the only function discovered for the calata comitia centuriata, mentioned by Labeo, in Gell. xv. 27. 2. The origin of the inauguration must have preceded that of the centuriate assembly; it must therefore have taken place for a time in some other form of meeting. Kübler, in Pauly-Wissowa, *Real-Encycl.* iii. 1331, objects to this interpretation but finds nothing better.

⁵ Cic. *Brut.* i (of an augur); *Phil.* ii. 43. 110 (of a flamen); *Leg.* ii. 8. 21 (of sacerdotes); Macrobi. *Sat.* iii. 13. 11 (of the flamen Martialis); Livy. i. 18. 6 (of the king).

⁶ Fest. 343. 8; Wissowa, *Relig. u. Kult. d. Römer*, 420, n. 5, 421, n. 1.

⁷ Gell. i. 12. 11, citing the lex Papia. Gellius calls this assembly a contio, which includes the calata comitia; cf. xv. 27. 3: "Calatiis comitiis in populi contione."

⁸ P. 161, 163, 165.

⁹ P. 157 f.

among other early peoples,¹ the assembly expressed its feeling or opinion by noisy demonstration finds strong support in the most probable derivation of *suffragium*, "vote," which connects it with *frangere*, *fragor*, "a breaking," "crash," "din," applause,"² the prefix *sub-* expressing the dependence of the action upon the proposal of the speaker, as in the military *succlamare*, *succlamatio*.³ We may well believe that even after the organization of the assembly as *comitia* — that is, in *curiate*, *centuriate*, or tribal divisions⁴ — the voting within the component groups continued for a time to be by *din*, as is suggested by the phrase *sex suffragia*, applied to the six oldest groups of knights in the *comitia centuriata*.⁵ Voting by heads in large gatherings is in fact a slow, cumbersome process, the product of a well-developed political life. In all probability it originated in the *centuriate* assembly — in which the military array facilitated the taking of individual opinion⁶ — and afterward extended to the other *comitia*. This line of reasoning suggests that when in the regal period a desire began to be felt for a more precise vote, and the *curiate* organization readily offered itself for the purpose, the expedient was adopted of taking the vote of each *curia* in order by *din* and then of deciding the question at issue by a majority of the thirty *curial* votes.⁷ There can be little doubt that this step also was first taken by the pontiffs.

The testamentary *calata comitia* met twice a year, probably on fixed days.⁸ It has been a disputed question whether the oldest form of testament here referred to required a vote of the people. Rubino⁹ strongly upheld the negative on the ground (1) of analogy with the procedure in inaugurations, (2) of analogy with other forms of testament, none of which required a

¹ P. 170. ² Quint. *Inst.* viii. 3. 3: *fragor* here signifies "thunders of applause."

³ Cic. *Fam.* xi. 13. 3; Livy xxviii. 26. 12; xl. 36. 4; xlii. 53. 1.

⁴ P. 135.

⁵ P. 74 f., 96.

⁶ P. 211.

⁷ On the meaning of *suffragium*, see the excellent article by Rothstein, in *Festschrift zu Otto Hirschfelds hundertem Geburtstag*, 30-3.

⁸ Gell. xv. 27. 3: "Isdem comitiis, quae *calata* appellari diximus, . . . testamenta fieri solebant"; Gaius ii. 101: "*Calatis* comitiis testamentum faciebant, quae *comitia* bis in anno testamentis faciendis destinata erant"; Theophilus, *Paraphr. Inst.* ii. 10. 1.

⁹ *Röm. Verf.* 242-5, with notes, following J. H. Dernburg, *Beitr. zur Gesch. der röm. Testamente*, i. 53-78.

vote, (3) of the word *testamentum* itself, which refers to witnessing, (4) of the conviction that the patricians would not leave to the popular assembly the making of private law, (5) on the authority of Theophilus,¹ who mentions the people's witnessing of the testament, (6) on the statement of Gellius² that wills of the kind were made "in *populi contione*." Against this reasoning may be urged (1) the analogy from the *adrogatio*, (2) the analogy from the testamentary adoption, to both of which cases the simple testament was similar, and both of which required a vote of the people,³ (3) the consideration that the act of witnessing in the assembly did not necessarily exclude a vote, (4) the statement of Gaius⁴ that *calata comitia* were convoked "for making" — not for witnessing — testaments, (5) the circumstance that the *contio* was often a preliminary stage of the voting assembly⁵ in addition to the fact that pontifical language applies the term to *comitia* in general.⁶ These arguments offset all the points offered by Rubino, unless it be the fourth, which is a purely subjective consideration. Arguments (1), (2), and (4) are especially effective for establishing the fact of a vote in the case under consideration. But the problem can be most satisfactorily solved (6) by comparative investigation. In the constitution of the early Indo-European family the estate belonged jointly to all the male members, and for that reason could not be given away by the pater.⁷ The primitive Germans accordingly made no wills, but left their property to their children, or in failure of children to the near kin.⁸ In Attica the right to bequeath was instituted by a law of Solon, which allowed it to those only who had no legitimate sons;⁹ in Sparta

¹ *Paraphr. Inst.* ii. 10. 1, p. 154 ed. Ferrini: 'Ο βουλόμενος ὑπὸ μάρτυρι διετίθετο τῷ δῆμῳ.

² XV. 27. 3. This view is accepted by Lange, *Röm. Alt.* i. 398 f.; Schiller, *Röm. Alt.* 628; Soltau, *Alltröm. Volksversammlung.* 39; Mommsen, *Röm. Forsch.* i. 126, 239, 270; Madvig, *Röm. Staat.* i. 221; Kübler, in Pauly-Wissowa, *Real-Encycl.* iii. 1333; Mispoulet, *Inst. polit. Rom.* i. 202 f.

³ P. 161.

⁴ II. 101.

⁵ P. 143.

⁶ P. 139.

⁷ Schrader, *Reallex.* 221, 864; Leist, *Alt-arisch. Jus Gent.* 419; *Alt-arisch. Jus Civ.* ii. 171; Fustel de Coulanges, *Ancient City*, 104.

⁸ Tac. *Germ.* 20. 5. The oldest Frankish laws make no mention of testaments; Schrader, *ibid.* 865.

⁹ Demosth. xx. 102; Plut. *Sol.* 21; Telfy, in *CJA.* 1399-1412, with comment, p. 613 ff.

the right was introduced by Epitadeus, perhaps early in the fourth century B.C.¹ Testaments were unknown in Gortyn at the time when the *Twelve Tables* of this city were published,² and similar conditions existed in other states of Greece.³ The rule holds, too, for ancient India.⁴ The Slavic householder could not alienate his land without the consent of the community.⁵ As there is no reason to assume a more advanced condition for primitive Rome, we may conclude that, as indicated above, the calata comitia not only witnessed but ratified testaments.⁶

Mommsen has attempted to fix these days as March 24 and May 24,⁷ on which the rex sacrificulus performed comitial ceremonies not clearly described by the sources.⁸ He admits, however, that the testamentary comitia met under the pontifex maximus rather than under the rex sacrorum⁹ — a fact directly opposed to his contention. We should be surprised also to find the testamentary days so close together.¹⁰ But the most effective argument against his view is that this function performed by the rex sacrorum could not have been the holding of comitia, for the time during which it continued was nefas.¹¹ The ancient

¹ Plut. *Agis*, 5; cf. Thumser, *Griech. Staatsalt.* 259.

² Bücheler und Zitelmann, *Recht von Gortyn*, 134.

³ Aristot. *Polit.* 1309, a 24; cf. Thalheim, *Griech. Rechtsalt.* 61.

⁴ Fustel de Coulanges, *Anc. City*, 105; Leist, *Alt-arisch. Jus Civ.* ii. 171.

⁵ Schrader, *Sprachw. und Urgesch.* ii.³ (1907). 374 f.

⁶ This view is held by Schrader, *ibid.* 865; Ihering, *Geist des röm. Rechts*, i. 145 ff.; Mommsen, *Röm. Staatsr.* ii. 37 f.; iii. 318 ff.; Kappeyne van de Coppello, *Comitien*, 67; Poste, *Gai Inst.* 178; Hallays, *Comices*, 18; and with some hesitation by Herzog, *Röm. Staatsverf.* i. 110, 118, 1063.

⁷ *Röm. Chronol.* 241 ff.; *Röm. Staatsr.* ii. 38, n. 2; iii. 319; *CIL.* i.² p. 289; accepted by Lange, *Röm. Alt.* i. 399; Kübler, in Pauly-Wissowa, *Real-Encycl.* iii. 1331; Marquardt, *Röm. Staatsv.* iii. 323.

⁸ Q(uando) R(ex) C(omitia)vit; *CIL.* i. p. 291 f. after the two days mentioned; cf. Varro, *L. L.* vi. 31: "Dies, qui vocatur sic, 'Quando Rex Comitavit, Fas' is dictus ab eo quod eo die rex sacrificulus litat (or perhaps venit, MS. dicat) ad comitium, ad quod tempus est nefas, ab eo fas; itaque post id tempus lege actum saepe"; Fest. ep. 259: "Quando Rex Comitavit Fas, in fastis notari solet, et hoc videtur significare, quando rex sacrificulus divinis rebus perfectis in comitium venit"; Ovid, *Fast.* v. 727; Plut. *Q. R.* 63; *Fash. Praenest.* Mart. 24; for other citations, see *CIL.* i.² p. 289.

⁹ *Röm. Staatsr.* ii. 38, n. 2.

¹⁰ Herzog, *Röm. Staatsverf.* i. 110, n. 2.

¹¹ See note 8 above; cf. Wissowa, *Relig. u. Kult. d. Römer*, 440, n. 6.

authorities state that "the sacrificial king, after performing sacred rites, comes into, or makes a sacrifice in (*venit* or *litat*), the *comitium*,"¹ but they do not mention an assembly; hence we may infer that in the *fasti* for these days reference is to some other function than the holding of *comitia*. The form of testament above described fell early into disuse,² so that the conditions and ceremonies attending it became a subject of study for antiquarians.

Adoptions ordinarily came before the praetor. The legal object was the perpetuation of the family and its religion. The law granted the privilege accordingly to those only who had no children and who were incapable of having children. It required further that the act should not imperil the continuance of the family from whom the adopted came.³ *Adrogatio* was the adoption of a person who was his own master and who accordingly consented to pass under the paternal power of another. The word signifies that the act to which it applies required a vote of the people.⁴ It was not undertaken rashly or without careful consideration.⁵ The persons concerned were required first to present the case to the college of pontiffs, who took into account "what reason any one has for adopting children, what considerations of family or dignity are involved, what principles of religion are concerned."⁶ The age of the man who wished to arrogate was considered — whether in this respect he was capable of having children of his own, and care was taken that the property of the arrogated person should not be insidiously coveted.⁷ The adrogator was asked whether he wished the candidate for adoption to be his real son, and the candidate was asked whether he would allow himself to be placed in this condition;⁸ and the testimonies were confirmed by an oath formulated by Q. Mucius Scaevola.⁹

¹ See p. 159, n. 8 above.

² Gaius ii. 101, 103.

³ Cic. *Dom.* 13. 34; cf. Leonhard, in Pauly-Wissowa, *Real-Encycl.* i. 398 ff.

⁴ Gell. v. 19. 4, 6 f.; Gaius i. 99; Cic. *Att.* ii. 12. 2; *Dom.* 15. 39.

⁵ Gell. v. 19. 5.

⁶ Cic. *Dom.* 13. 34.

⁷ Gell. v. 19. 6.

⁸ Gaius i. 99.

⁹ Gell. v. 19. 6; cf. the leaden tessera showing on the face a man taking another by the hand and the word *ADOPTIO* beneath; on the back are three officials seated, doubtless pontiffs, with the word *COLLEGIUM* beneath; Helbig, in *Compt. rend. d. l'acad. d. inser. et bell.-let.* xxi (1893). 350-3. It evidently illustrates the preliminary stage of an *adrogatio*; see also Tac. *Hist.* i. 15.

If the pontiffs gave their consent, the case came before the comitia curiata under the presidency of the chief of the college,¹ who put the question in the following form: "Do you wish and order that L. Valerius be the son of L. Titus by the same legal rights as if born of the father and mother of that family, and that the latter have the power of life and death over the former as a father over a son? This order I request of you, Romans, to grant, just as I have pronounced the words."² The curiae decided by vote.³ At the same meeting the arrogated son was required to declare that he forsook the religion of the family or gens of his birth — *detestatio sacrorum*⁴ — and by a similar declaration the adrogator received him into the sacra of the new family.⁵ This form of adoption could not apply to youths before they had put on the manly gown, or to wards or women; for children and women had no part in an assembly, and guardians were not allowed under any circumstances to place their wards in the power of another.⁶

A modification of adrogatio is testamentary adoption, of which the only well-known case is that of Octavius, the heir of the dictator Caesar. Octavius came before a praetor with witnesses and formally accepted the inheritance;⁷ afterward he was declared adopted by a vote of the curiae.⁸ As this case is nearly akin to the adrogatio, there can be no doubt that the vote was taken in the calata comitia under pontifical presidency.⁹

¹ Gell. v. 19. 5 f.: "Adrogationes non temere neque inexplorata committuntur; nam comitia arbitris pontificibus praebentur, quae curiata appellantur"; Tac. *Hist.* i. 15: "Si te privatus lege curiata apud pontifices, ut moris est, adoptarem." Rubino, *Röm. Verf.* 253, supposes that these comitia were under a civil magistrate; but the expressions "arbitris pontificibus" and "apud pontifices" prove pontifical management. Caesar, who passed the curiate law for the arrogation of Clodius, was supreme pontiff as well as consul.

² Gell. v. 19. 9.

³ Gell. v. 19. 8; Tac. *Hist.* i. 15; Cic. *Dom.* 15. 39; *Att.* ii. 12. 2; Dio Cass. xxxvii. 51. 1 f. Mommsen, *Röm. Forsch.* i. 126, 270, supposed that the curiae simply witnessed the transaction, without giving their vote; but afterward (*Röm. Staatsr.* iii. 38) he changed his mind.

⁴ Gell. xv. 27. 3.

⁵ This seems to be the meaning of Serv. in *Aen.* ii. 156: "Consuetudo apud antiquos fuit, ut qui in familiam vel gentem transiret, prius se abdicaret ab ea in qua fuerat et sic ab alia acciperetur."

⁶ Gell. v. 19. 8, 10.

⁷ Appian, *B. C.* iii. 14. 49.

⁸ Ibid. iii. 94. 389; Dio Cass. xlv. 5. 3.

⁹ On the testamentary adoption, see further Leonhard, in Pauly-Wissowa, *Real-Encycl.* i. 420 f.

Distinct from the adrogatio, though analogous to it, was the direct passing of individuals and of gentes from the patrician to the plebeian rank — *transitio ad plebem*. The motive was a desire to qualify for the tribunate of the plebs,¹ or more generally to widen the range of one's eligibility to office.² The history of the republic affords several instances of the transition of individuals;³ and two plebeian gentes, the Octavia⁴ and the Minucia,⁵ boasted of having passed over from the patricians. Even if these boasts rest upon genealogical falsifications,⁶ the Romans thought such an act legally possible; and they formulated a process applicable to every case whether of individuals or of gentes. It was through some other ceremony than the adrogatio, for the latter could not apply to groups of persons. Clodius was following the more general procedure here referred to when in the year 60 he tried to make himself a plebeian without recourse to adrogatio. First he abdicated his nobility by an oath, probably taken in the *comitia calata*;⁷ then coming before an assembly of the plebs, he held himself ready to receive plebeian rights through a resolution introduced by the tribune Herennius.⁸ The process allowed the retention of the name, *sacra*, and all other privileges not dependent on the patriciate.⁹

¹ Zon. vii. 15. 9.

² Cic. *Dom.* 14. 37; *Scaur.* 33; *Ascon.* 25.

³ Mommsen, *Röm. Forsch.* i. 123 ff., has collected the cases.

⁴ Suet. *Aug.* 2.

⁵ Livy iv. 16. 3.

⁶ Cic. *Brut.* 16. 62.

⁷ Dio Cass. xxxvii. 51. 1: *Τὴν τε εὐγένειαν ἐξωμύσατο*. The similarity of this oath to the *detestatio sacrorum* warrants the conclusion that it, too, was taken in the *calata comitia*. The abjuration of one's rank, however, was not a *detestatio sacrorum*, for the reason given in n. 8 below.

⁸ Dio Cass. xxxvii. 51. 1: *Καὶ πρὸς τὰ τοῦ πλῆθους δικαιώματα, ἐς αὐτὸν σφιν τὸν σύλλογον ἐσελθὼν, μετέστη*; Cic. *Att.* i. 18. 4: "C. Herennius . . . tribunus pl. . . ad plebem P. Clodium traducit." Cicero's following statement ("*Idemque fert, ut universus populus in campo Martio suffragium de re Clodi ferat*") signifies that Herennius was proposing to bring the question not before the centuries, as Drumann-Gröbe, *Gesch. Roms*, ii. 188, n. 3, imagines, for a tribune had no means of doing so, but before the thirty-five tribes, who were the *universus populus* (Cic. *Leg. Agr.* ii. 7. 16f.) in contrast with the *curiate comitia* represented by thirty *lictors*; cf. p. 129 f.

⁹ The falsification of pedigrees by plebeian families to prove descent from patrician ancestors of the same name is sufficient evidence that the name was retained through the transition; cf. Lange, *Kleine Schriften*, ii. 7 f. Were not the *sacra* retained, the transition of an entire gens would mean the destruction of its old religion and the creation of a new one — which is impossible. For this reason it appears that the *detestatio sacrorum* did not apply to such cases of transition.

But Metellus, the consul, objected that a curiate law was needed to make the act valid, and the senate evidently agreed with him.¹ Metellus may have had in mind the transition through the *adrogatio*, which required a curiate law, or more probably he was thinking of a vote of the *curiae* in addition to the other formalities which Clodius was passing through.² The complete process accordingly would have been the abjuration of the *patriate*, confirmed by a curiate law, and the reception of plebeian rights through a *plebi scitum*. Clodius was not so foolish as to suppose that a process of *transitio* invented by himself would prove acceptable to the senate and magistrates, and must therefore have followed as closely as possible the formula which he believed to be legal. But when Metellus raised the objection, and when the tribunes persisted in interceding against the *plebi scitum*,³ he yielded for the present, and in the following year had himself arrogated by a plebeian named Fonteius, from whom he was forthwith emancipated.⁴ This procedure, too, allowed him to retain the gentile name of his birth,⁵ his *imagines* and *sacra*,⁶ and consequently his inheritance. The oath taken in the *calata comitia* accordingly was not the *detestatio sacrorum* usual in arrogations, but a form of declaration which reserved these privileges, with the understanding that in this case the *arrogatio* was not for the customary object but to enable him to change his rank.⁷

¹ Lange, *ibid.* ii. 19.

² The fact that he promulgated a bill of the same tenor as that of Herennius, even if it was merely for the sake of appearance, as Cicero, *Att.* i. 18. 5, alleges, favors the latter view.

³ Cic. *Att.* i. 19. 5.

⁴ Dio Cass. xxxvii. 51. 2; xxxviii. 12. 1 f.; Cic. *Dom.* 13. 35; 29. 77.

⁵ Cic. *Dom.* 14. 37: "Nam adoptatum emancipari statim, ne sit eius filius qui adoptarit"; 13. 35: "Tu (Clodi) neque Fonteius es, qui esse debebas, neque patris heres neque amissis sacris paternis in haec adoptiva venisti." In *Har. Resp.* 27. 57 ("Iste parentum nomen, sacra, memoriam, gentem Fonteiano nomine obruit") Cicero does not say that Clodius assumed the gentile name of Fonteius, but rather that he used this name as a means of destroying the name, *sacra*, etc. of his parents; and in fact he continued to be called Clodius; cf. Dio Cass. xxxix. 23. 2 (official use). He claimed still to belong to the Clodian gens rather than to the Fonteian (Cic. *Dom.* 44. 116), whereas Cicero, looking upon the emancipation as a sham, insists that he was a Fonteian.

⁶ That he retained the Claudian *imagines* is implied in Cic. *Mil.* 13. 33; 32. 86. He must therefore have kept the rest of the *sacra*.

⁷ Lange, *Kleine Schriften*, ii. 23 ff. Cicero aims to bring the greatest possible confusion into the case by representing Clodius as having given up his native religion

Analogous to the *transitio ad plebem* is the elevation of a plebeian to the patrician rank. The Romans believed that eminent plebeians, including foreigners of distinction newly admitted to citizenship, were sometimes granted the patriciate not only through the regal period but also in the opening years of the republic. For the republican age they represented the bestowal as a double act, a resolution of the people followed by coöptation into the senate.¹ In stating that the first consuls chose the best men from the commons, made them patricians, and with them filled the senate to the number of three hundred, Dionysius² apparently has in mind the consuls' function of recruiting the senate before the Ovinian legislation,³ together with their initiative in granting the patriciate. The Roman view that the bestowal required a vote of the people is further proved by the procedure of Julius Caesar and of Octavianus in creating new patricians; for in this function they doubtless followed tradition as nearly as possible. In 45 a *plebi scitum*,⁴ proposed by L. Cassius Longinus and supported by a *senatus consultum*,⁵ empowered Caesar to recruit the patrician rank. Octavianus proceeded in a similar manner except that a consular law,⁶ approved also by a *senatus consultum*,⁷ was passed for the purpose. As the object was religious, we may suppose that the qualifications of the candidates were previously examined by the pontifical college. On the analogy of the *transitio*

without receiving that of Fonteius, as being a gentilis of the Claudii though he had left the Claudian gens, etc.; *Dom.* 13. 35; 49. 127.

¹ This double act is most clearly stated by Livy iv. 4. 7: "Nobilitatem istam vestram . . . non genere nec sanguine sed per cooptationem in patres habetis . . . post reges exactos iussu populi"; p. 17, n. 5; cf. Dion. Hal. v. 40. 5: "Ἡ βουλὴ καὶ ὁ δῆμος εἰς τε τοὺς πατρικίους αὐτὸν (Appius Claudius) ἐνέγραψε. This passage shows that Dionysius regards the process as an act of the people and of the senate, though he does not speak of the latter as coöptation. In the case of Appius Claudius Livy, ii. 16. 5, says simply that he was enrolled among the patres ("inter patres lectus"), and in like manner Suetonius, *Vib.* i, states that the patrician gens Claudia was coöpted into the class of patrician gentes. ² V. 13. 2. ³ Fest. 246. 23.

⁴ This measure is called the *lex Cassia*; Tac. *Ann.* xi. 25; p. 456 below. There can be no doubt that the author was L. Cassius Longinus, a faithful friend of the dictator, who entered upon his tribunate Dec. 10, 45; Drumann-Gröbe, *Gesch. Roms*, ii. 128 f.; iii. 602. ⁵ Dio Cass. xliii. 47. 3; xlv. 2. 7; Suet. *Caes.* 41.

⁶ The *lex Saenia*; Tac. *Ann.* xi. 25.

⁷ Augustus, *Mon. Ancyr.* 8; Dio Cass. lii. 42. 5.

ad plebem it may be assumed further that the candidate abjured his plebeian rank in the calata comitia, which then confirmed his declaration by vote.¹

But whether the Romans were right in supposing patricians to have been created in the early republic has been doubted. Mommsen² takes the ground that when the curiae ceased to be exclusively patrician, elevation to the rank became impossible, and that therefore no cases of the kind occurred after the fall of the kings. But in such a matter it is absurd to speak of impossibilities; everything was possible which the governing power approved, and the argument falls when its basis, the purely patrician state, has been removed.³ The cessation was in fact due to the growing exclusiveness of the patricians, who as they came to supplant the king in the government, learned to value their privileged position so highly they were unwilling longer to share it with others. Just when the closing of their rank was effected has not been ascertained, but there is no good reason for rejecting the Roman view that for a time after the fall of the kings plebeians continued to be admitted: in reality the indications are strong for a relatively late closing.⁴

We may next inquire how patricians were created in the time of the kings. As the history of the regal period is in general a reconstruction with material drawn from later time, so in this particular case ancient writers sometimes date back to the age of the kings the usage of the republic. Dionysius⁵ accordingly states that "the Romans by vote transferred Servius Tullius from the plebeian to the patrician order, just as they had previously transferred Tarquin the Elder and still earlier Numa Pompilius." But the Romans preferred to reconstruct

¹ Neither the pontifical examination nor the curiate law is noticed by the authorities, who refer briefly to the two acts. Lange, *Röm. Alt.* iii. 472, and Mommsen, *Röm. Staatsr.* ii. 1101, suppose that Caesar as supreme pontiff made the adlectio, although, as Mommsen notices, Octavianus had not yet attained to that office when he attended to the same function. Both writers (cf. Lange, *ibid.* i. 412) understand the curiate assembly to have been a factor in the process. On these late adlectiones, see also Herzog, *Röm. Staatsverf.* ii. 38 f., 130; Drumann-Gröbe, *Gesch. Roms*, iii. 602; Büdinger, in *Denkschr. d. kaiserl. Akad. d. Wiss. Phil.-hist. Cl.* xxxi (1881). 211-73; xxxvi (1888). 81-125.

² *Röm. Staatsr.* iii. 32.

³ Ch. ii above; also p. 166, n. 3 below.

⁴ Botsford, in *Pol. Sci. Quart.* xxii (1907). 689-92.

⁵ IV. 3. 4.

the process on an entirely different principle. Regarding the kings as the founders of all the fundamental institutions, the patricians looked upon their superior rank as a gift of these monarchs. The patriciate depended upon senatorial membership, which was at the disposal of the kings.¹ This view is well adapted to explain the creation of the senate; but for the period after its establishment Livy² adds to the adlectio of the king a coöptatio by the patres (senators). Livy's account of the usage here given is reasonable; the king indicated his preference as to the choice of advisers, but a powerful council, such as the senate must have been, at least in the later regal period, would have the final decision on the question of admitting a new member. The conclusion is that toward the end of the monarchy, if not from the beginning, plebeians were admitted to the senate, and through it to the patriciate, by the coöperation of the king and the senate, the people having nothing to do with the matter.³ But after the overthrow of the monarchy the vote of the people was substituted for the will of the king, coöptation by the senate continuing as before.⁴

The patriciate was acquired not only through bestowal by the state, but also through the adoption of a plebeian into a patrician family. Several cases of the kind have been ascertained.⁵ The act took place before the praetor⁶ and did not concern the comitia. Probably a preliminary examination by the pontiffs was necessary to adoptions as well as to arrogations.⁷

¹ P. 17.

² IV. 4. 7; p. 24, n. 5, 200, n. 1; cf. Suet. *Tib.* 1: "Patricia gens Claudia . . . in patricias coöptata."

³ Mommsen's theory (*Röm. Staatsr.* iii. 29 and n. 2) that the patriciate was conferred through the cooperation of the king and the comitia appears accordingly to rest on a weak foundation. He gives no evidence, but bases his contention on the argument (1) that the community was sovereign, (2) that — the patriciate being in his opinion equivalent to the citizenship and the comitia curiata being a group of gentes — the downfall of the comitia made the reception of gentes impossible. Ground is taken against the theory of popular sovereignty in the following chapter. Against his second point it can be urged that the original comitia were neither patrician nor "gentile"; hence there is no occasion for speaking of the downfall of such comitia or of its sweeping consequences.

⁵ Mommsen, *Röm. Forsch.* i. 74 ff.

⁴ Livy iv. 4. 7; p. 17, n. 5, 164, n. 6.

⁶ Gell. v. 19. 1-3.

⁷ Such an examination was the only means by which the patricians could protect their order from being flooded by plebeians; cf. Mommsen, *ibid.* i. 77, who notices

Rubino, J., *Röm. Verfassung*, 241-53; Mommsen, *Röm. Forschungen*, i. 123-7, 397-409; *Röm. Chronologie*, 241 ff.; *Röm. Staatsrecht*, ii. 33-41; iii. 38-40; Lange, L., *Röm. Allertümer*, i. 131-4, 177 f., 356 f., 362, 398-401, 459, 795; ii. 518, see also indices s. *Adrogatio*, *Calatores*, *Detestatio sacrorum*; *Transitio ad plebem*, in *Kleine Schriften*, ii. 1-90; Madvig, J. N., *Verf. u. Verw. d. röm. Staates*, i. 222-6; Herzog, E., *Röm. Staatsverfassung*, i. 108-11, 1062-4, 1075; Mispoulet, J. B., *Institutions politiques des Romains*, i. 202 f.; Willems, P., *Droit public Rom.* 53 f.; Drumann-Gröbe, *Gesch. Roms*, ii. 187 ff.; Wissowa, G., *Religion und Kultus der Römer*, 440 f.; Hallays, A., *Comices à Rome*, 16-9; Mercklein, D. L., *Coöptation der Römer*, 11-44 (of the gentes and of the senate); Helbig, W., in *Comptes rendus de l'acad. des inscr. et belles-lettres*, xxi (1893). 350-3; Büdinger, M., *Cicero und die Patriciat*, in *Denkschr. d. Kaiserl. Akad. d. Wiss. Phil.-hist. Cl.* xxxi (1881). 211-73; *Der Patriciat und das Fehderecht in den letzten Jahrzehnten der röm. Rep.*, *ibid.* xxxvi (1888). 81-125; Baudry, F., *Adrogatio*, in Daremberg et Saglio, *Dict.* i. 83 f.; Saglio, E., *Calator*, *ibid.* i. 814; Humbert, G., *ibid.* i. 1375 f.; *Detestatio sacrorum*, *ibid.* ii. 113; Leonhard, *Adrogatio*, in Pauly-Wissowa, *Real-Encycl.* i. 419-21; Samter, *Calatores*, *ibid.* iii. 1335 f.; Kübler, *Calata comitia*, *ibid.* iii. 1330-4; Ruggiero, E., *Diz. ep.* ii. 1185; Smith, *Dict.* i. 26 f.; Nettleship, *Contrib. to Lat. Lexicog.* 400.

that no known instance of this kind of adoption took place before the admission of plebeians to the pontifical college through the Ogulnian law, 300; p. 309 below.

CHAPTER IX.

THE COMITIA CURIATA

THE primitive European assembly, of which the Roman is a variety, may be reconstructed in broad outline by a comparison of the forms and functions of the institution as found among the earliest Italians, Greeks, Celts, Germans, Slavs, and kindred peoples, among whom it differed in detail while possessing the same general features. The usual tendency of development was toward the abridgment of popular powers to the advantage of the nobles or of the king;¹ but in some instances may be discovered a growth in the opposite direction.

Generally the assembly did not have fixed times of meeting but convened only when called by the king or chiefs. This is known to be true of the Homeric Greeks,² of the Slavs,³ and of the Romans,⁴ and may be regarded as the more primitive condition. In addition to extraordinary sessions the German assembly acquired the right to meet regularly twice a month at fixed times⁵—a right which gave the people a valuable political advantage. In like manner the Lacedaemonians met once a month;⁶ the Athenians probably once a prytany (tenth of a year) after Cleisthenes, and certainly four times a prytany after Pericles.⁷ The Celtic assemblies convened annually or triennially at fixed seasons.⁸ Among all these peoples, however, subjects for consideration were presented by none but the king

¹ Schrader, *Reallexikon*, 924; Spencer, *Principles of Sociology*, ii. 407.

² *Il.* i. 54; ii. 50; xix. 40 ff.; *Od.* ii. 6 f.

³ Kovalevsky, *Modern Customs and Ancient Laws of Russia*, 122, 124.

⁴ We must except the purely sacerdotal meetings of the curiae described in the preceding chapter.

⁵ Tac. *Germ.* 11. 2; cf. Schröder, *Deutsche Rechtsgesch.* 22 f.

⁶ *Rhetra* of Lycurgus, in Plut. *Lyc.* 6; cf. Gilbert, *Altspart. Gesch.* 131 f.

⁷ Arist. *Ath. Pol.* 43. 4; cf. Gilbert, *Const. Antiq. of Sparta and Athens*, 285.

⁸ This is true of the religious-judicial assemblies of the continental Celts (Caesar, *B. G.* vi. 13), which may also have exercised political functions, and of the Irish assemblies; Ginnell, *Brehon Laws*, 44, 51, 54; cf. Schrader, *Reallexikon*, 924.

or chief, the assembly itself being wholly without initiative. Such subjects were as a rule previously discussed in a council of chiefs or nobles.¹ The person who summoned the assembly naturally made the first speech, which explained the purpose of the meeting and the character of the subject to be considered. If it was an enterprise in which he desired the support or coöperation of the community, he attempted to rouse for it the enthusiasm of his hearers.² The discussion might then be continued by the chiefs or any others distinguished for age, military prowess, or eloquence.³ Among the Germans, who possessed more than the average degree of liberty, any one spoke who could gain a hearing; in the Homeric assembly a commoner who dared lift up his voice against king or noble was liable to severe chastisement as a disorderly person;⁴ and conditions at Rome, as well as in Etruria,⁵ seem to have been equally unfavorable to the ordinary freeman.

A considerable variety of business came before the assembly. It might be summoned to hear the announcement of news of interest to the community,⁶ the reading of the calendar for the month,⁷ the declaration of a policy or opinion by a king or chief,⁸ or for witnessing acts affecting the interests of the community.⁹

¹ The Celtic magistrates disclosed to the people those matters only which they determined to be expedient; and it was unlawful to speak on public affairs outside the assembly; Caesar, *B. G.* vi. 20. The German chiefs in council preconsidered every subject to be presented to the assembly; Tac. *Germ.* 11. 1; Schröder, *ibid.* 23. The prominence of the nobles in the Slavic assembly (Kovalevsky, *ibid.* 123 ff.) would lead to the same conclusion regarding them. For the Homeric age of Greece the meeting of the council previous to the assembly as described by *Il.* ii. 50 ff. is typical, although we could not expect the poet in every case to repeat the procedure with uniform minuteness. The preconsidering power of the Roman senate was of the same nature.

² *Il.* ii. 278 ff.

³ Tac. *Germ.* 11. 4. As a rule the North American Indians enjoy the same freedom of speech in their councils; Farrand, *Basis of American History*, 160, 211.

⁴ *Il.* ii. 211 ff.; xii. 212 f. Calchas the seer, a man of the people, gained the protection of Achilles before daring to speak against Agamemnon; *Il.* i. 76 ff.

⁵ On the control of the Etruscan assembly by the nobles, see Müller-Deecke, *Etrusker*, i. 337; Hirt, *Indogermanen*, i. 55.

⁶ *Od.* ii. 28 ff.

⁷ P. 154 f.

⁸ *Od.* ii. 35 ff.; cf. the public complaint made by a Slavic chief of an injury he had received; Kovalevsky, *ibid.* 121.

⁹ Such as the reception of the youth into the warrior class among the Germans; Tac. *Germ.* 13. 2; for the witnessing assembly at Rome, see p. 155 f.

More important were judicial cases,¹ questions of war and peace,² and elections.³

The problem as to the relative power of the king and council on the one hand and of the assembly on the other is difficult. It was a disadvantage to the people, over and above their lack of initiative, to have no means of precisely expressing their will. The Greeks signified their approval by acclamation,⁴ the Germans by clashing their weapons,⁵ and the Celts by both;⁶ either demonstration aimed to express, not the will of the majority,⁷ but the intensity of conviction on the part of the assembly as a whole. It lacked as well the means of legally enforcing its will.⁸ The Achaeans in assembly approved the petition of

¹ Schrader, *Reallexikon*, 659, 662, 688. For the Celts; Caesar, *B. G.* vi. 13; cf. i. 4 (trial of Orgetorix). For the Germans; Tac. *Germ.* 12. 1 f. For the Slavs; Kovalevsky, *Mod. Cust. and Anc. Laws*, 126. The famous trial scene in the Homeric assembly; *Il.* xviii. 497 ff. For the Macedonians; Curt. vi. 8. 25. It is probably true of Vedic India; Schrader, *ibid.* 688.

² For the Germans; Brunner, *Deutsche Rechtsgesch.* i. 129. For the Slavs; Kovalevsky, *ibid.* 128, 130, 141 f. For the Celts; Polyb. iii. 44. 5 f.; Caes. *B. G.* v. 27, 36; Livy xxi. 20. 3; Tac. *Hist.* iv. 67. The Helvetian assembly probably decided the question of migration; Caesar, *B. G.* i. 2. As to the Greeks, Agamemnon proposed to the assembly to quit the war and return home, the people gladly accepted; *Il.* ii. 86 ff. A proposal of peace came from the Trojans to the Achaean assembly; the people rejected it on the advice of Diomedes, and Agamemnon concurred in their opinion; *Il.* vii. 382 ff.

³ The German mode of electing a king or war-leader is well known; cf. Brunner, *ibid.* i. 129. The assembly also elected the chiefs of the pagi (Gaue) and of the villages; Tac. *Germ.* 12. 3. The Celts who were not ruled by hereditary kings elected their chiefs annually (Caesar, *B. G.* i. 16) or for a migration; *ibid.* 3. The Irish kings were generally elected from particular families; Ginnell, *Brehon Laws*, 66. The Slavs elected their king and other officials; Kovalevsky, *ibid.* 124 f., 127, 129, 138 f. In Homeric Greece the kingship was generally hereditary, but the people might elect a war-leader to take command by the side of the king; *Od.* xiv. 237; cf. xiii. 266. There are traces of elective kingship, lasting at least a few generations, in the great majority of early European states; Jenks, *History of Politics*, 87; cf. 35 f.

⁴ *Il.* i. 22 ff. For the Lacedaemonians, see Thuc. i. 87.

⁵ Tac. *Germ.* 11. 5; *Hist.* v. 17. Sometimes the Germans mingled clamor with the clash of weapons; Amm. Marc. xvi. 12. 13.

⁶ Caesar, *B. G.* vii. 21.

⁷ Majority rule was unknown to primitive times. The members of the council talked together till they came to a unanimous agreement. If the Homeric Greeks in assembly failed to agree, each party went its own way; *Od.* iii. 150 ff. Among the Slavs the majority forced a unanimous vote by coercing the minority; Kovalevsky, *ibid.* 122 ff. For the Germans; Seeck, *Gesch. d. Unterg. d. antik. Welt*, i. 213.

⁸ For the Homeric Greek assembly, see Hermann-Thumser, *Griech. Staatsalt.* 67 f.

Chryses, a suppliant priest; nevertheless King Agamemnon rejected it.¹ After the people had divided the spoils of war, Agamemnon seized the prize they had given another.² The Trojans were ready to surrender Helen for the sake of peace; but Priam, to gratify his son, refused, and the war went on.³ In his relations with individuals the king often acted unjustly and tyrannically. Even in affairs which concerned the entire community he might take large liberty. Without consulting the assembly he could count on the support of the people in a war of defence. Treaties of peace, which were often guest-friendships and intermarriages between royal families,⁴ did not come before the people for ratification as a right, but only in cases in which their pledge seemed necessary for the prevention of private warfare. The right of the magistrate to conclude peace with or without discussion in the council or senate was recognized by the states of Italy as late as the Second Samnite war.⁵ The king might even declare an offensive war on his own responsibility, if without consulting the people he could feel sure of their support.⁶ Enterprises requiring their coöperation he usually submitted to them to win their approval, as he had no means of coercing the entire community. His independence of the assembly increased with the growth of heredity. The idea of sovereignty, strictly speaking, was unknown to primitive times;

¹ *Il.* i. 11 ff.

² *Ibid.* i. 135 ff., 320 ff.

³ *Ibid.* vii. 345 ff.

⁴ In Italy, *Livy* i. 45. 2; 49. 8.

⁵ This right is proved by the fact that the death of a king freed the neighboring states from their treaty obligations to his community, e.g., the Fidenates after the death of Romulus; *Dion. Hal.* iii. 23. 1; the Latins after the death of Tullus; *Dion. Hal.* iii. 37. 3; various neighbors after the expulsion of the last Tarquin; *Dion. Hal.* viii. 64. 2; cf. Rubino, *Röm. Verf.* 175, n. 2. At the time of the Caudine disaster (321 B.C.) the Samnite leader assumed that the Roman consuls were competent in their own right to conclude a definitive peace; *Livy* ix. 2 ff.

⁶ Among the Quadi the right to declare war belonged to the council, not to the assembly; *Amm. Marc.* xxx. 6. 2. With the Saxons the will of the nobles was equivalent to the will of the people; *Beowulf*, cited by Seeck, *ibid.* i. 217. 7, see also his notes on p. 531. The Sabine senators (*senes*) are represented as responsible for the continual wars of their people with the Romans; *Livy* ii. 18. 11. In general the leading men and the senate were able by their own oath to bind the community; *Caes. B.G.* iv. 11; cf. 13. A chief might work his will by packing an assembly with men on whom he could rely; *Tac. Hist.* iv. 14. The Grand Duke of Russia, relying on his *comitatus*, sometimes went to war without consulting the people; Kovalevsky, *Mod. Cust. and Anc. Laws*, 142.

yet so far as people thought of political power, they assigned it to the king and council.¹ Nevertheless the fact of the assembly's existence and the need of eloquence for persuading it prove it to have been a real force. The suppression of the German assembly or the prohibition of carrying arms to the meeting was looked upon as intolerable tyranny.² For the disturbance of an Irish assembly the penalty was death.³ Public opinion was a check on royalty,⁴ and in extreme cases the people rebelled and killed their king.⁵

The strengthening of the kingship naturally tended to weaken the assembly. The Lacedaemonian kings had a right to make war on whatever state they pleased, and any citizen who obstructed this power was accursed;⁶ if, too, in anything the people gave a wrong decision, the kings and council could set it right.⁷ Under the Frankish monarchy the general assembly seems to have entirely disappeared in the sixth century A.D., to be revived in the latter part of the seventh,⁸ in a form which took little account of the commons.⁹ In the other Germanic tribes which entered the Empire the effect of the migration was to strengthen the king and to weaken in a corresponding degree the power of the people.¹⁰ In Russia Tartar domination, converting the legitimate princes into tyrants, effected the downfall of

¹ Leist, *Græco-ital. Rechtsgesch.* 130, 136 f. Under favorable conditions the assembly acquired sovereignty, as at Athens and for a time in Russia; Kovalevsky, *Russian Political Institutions*, 17. Schrader, *Reallexikon*, 923 f., following Mommsen (cf. also Post, *Grundlagen des Rechts*, 130; Cramer, *Verfassungsgesch. d. Germ. u. Kelt.* 61 et pass.), is altogether wrong in supposing the assembly to have been originally sovereign.

² Tac. *Hist.* iv. 64. Charlemagne suppressed the assemblies of the Saxons except for receiving communications from his missi and for the administration of justice; *Cap. de Part. Sax.* i. 70. 34 (Boretius 26. p. 68).

³ Ginnell, *Breton Laws*, 42.

⁴ *Od.* iii. 214 f.; xiv. 239; xvi. 75, 95 f., 114; xix. 527.

⁵ In Homeric Greece; *Il.* i. 231 f.; iii. 57. The Herulians killed their king merely because they were weary of royal government; Procopius, *Bel. Goth.* ii. 14, p. 422 A. Sometimes the Celtic commons massacred both magistrates and council, and took affairs into their own hands; Polyb. ii. 21; Caesar, *B. G.* iii. 17. ⁶ Hdt. vi. 56.

⁷ *Rhetra* of Polydorus and Theopompus, in Plut. *Lyc.* 6. This power is essentially the same as the *auctoritas* of the Roman patres.

⁸ Fustel de Coulanges, *Monarchie Franque*, 598 ff.

⁹ *Ibid.* 638 ff.

¹⁰ Hodgkin, *Italy and her Invaders*, iii. 239 ff.

the assemblies.¹ The building up of large states, too, necessarily degrades or destroys popular gatherings.²

The heritage of the Roman assembly from the earlier tribal time must have been slight as well as vague—a heritage diminished further by the growing power of the king and nobles. The assumption has often been made that from the beginning the Roman assembly was sovereign. The view rests in part, however, on a confusion of two ideas which should be kept distinct. In its broadest sense *populus* designates the state, which is sovereign whether it expresses its will through the king, the senate, or the popular assembly, or through the concurrence of two or more of these elements. In interstate relations it always has this meaning. More narrowly *populus* signifies the masses of citizens in contrast with the magistrates or with the senate.³ In the latter sense it cannot be said that the *populus* was from the beginning sovereign. The Romans themselves of later time understood that in the regal period the senate had the wisdom to advise, the king possessed the imperium, whereas the people enjoyed but a limited degree of freedom, right, and power.⁴ Their condition was not liberty but a preparation for it.⁵ Their assembly, like that of other early Europeans, had no power of initiative; it met only when summoned by the king, and could consider those matters only which the king brought before it. Its object must have been chiefly to receive information and to witness acts of public importance. In no case did the king call upon the assembly for advice; counsel belonged exclusively to the wise elders, who composed the senate;⁶ and should he wish to instruct the people in the merits of a proposed measure, he would himself address them and perhaps invite the most respected senators or his most trustworthy supporters among the private citizens to give the masses the benefit of their wisdom.⁷ In other than judicial

¹ Kovalevsky, *Mod. Cust. and Anc. Laws*, 148.

² The rest of this chapter is largely a reproduction of Botsford, *Lex Curiata*, in *Pol. Sci. Quart.* xxiii (1908). 498–517.

³ P. 2, 176.

⁵ Livy i. 46. 3; 60. 3; ii. 1. 6 f.; 15. 3.

⁶ Cic. *Planc.* 4. 9: "Non est consilium in vulgo."

⁷ Cf. Livy i. 34. 12.

⁴ Cic. *Rep.* 28. 50; cf. 23. 43.

assemblies the privilege of speaking must have been sparingly granted.¹ Finally no elective or legislative act of the curiae was valid without the authorization of the senate (*patrum auctoritas*).²

With reference to the specific rights of the assembly, Dionysius³ states that Romulus granted the commons three prerogatives, (1) to elect magistrates, (2) to ratify laws, (3) to decide concerning war, whenever the king should refer the matter to them. Livy's⁴ stricture on the absolutism of Tarquin the Proud implies, too, that constitutionally the assembly should have had power to decide on peace and war. But stress should be laid on the admission of Dionysius that probably all the questions above enumerated, or at least those of peace and war, were referred to the assembly at the pleasure only of the king—that the decision of them was not a right of the people, but a concession on the part of the sovereign.⁵ Still more important, these generalizations are in great part invalidated, as Rubino⁶ has shown, by the testimony of their authors. When either refers to individual cases of treaty-making under the kings, he never connects the assembly with the proceedings.⁷ It is significant, too, that the formula of treaty makes the king the only actor, taking no account of the people.⁸ Usually peace continued merely through the lifetime of the king who contracted it,⁹ but a truce for a definite period was binding to the end, even after his death.¹⁰ Under the republic to the time of the decemvirs the treaty-making power resided in the consuls

¹ P. 145.

² P. 235.

³ II. 14. 3: Τῷ δὲ δημοτικῷ πλῆθει τρία ταῦτα ἐπέτρεψεν· ἀρχαιρεσιάζειν τε καὶ νόμους ἐπικυροῦν καὶ περὶ πολέμου διαγιγνώσκειν, ὅταν ὁ βασιλεὺς ἔφη.

⁴ I. 49. 7.

⁵ This interpretation, offered by Rubino, is accepted by Lange, *Röm. Alt.* ii. 599.

⁶ *Röm. Verf.* 257 ff.

⁷ The treaty with the Sabines rested on the oaths of the two kings alone; Livy i. 13. 4; Dion. Hal. ii. 46. 3; Plut. *Röm.* 19. Romulus of his own authority made a hundred years' truce with Veii; Dion. Hal. ii. 55. 5 f. With the advice of the senate he solicited alliances with the neighboring states; Livy i. 9. 2. Numa personally contracted alliances with the surrounding states; Livy i. 19. 4. Tullus Hostilius made a treaty with the Sabines, the indemnity being fixed by a *senatus consultum*; Dion. Hal. iii. 32. 6. For other citations, see Rubino, *ibid.* 264, n. 3.

⁸ Livy i. 24. 4 ff.

⁹ P. 171, n. 5 above.

¹⁰ Livy i. 30. 7.

and senate.¹ Ordinarily either a *senatus consultum* empowered the magistrates to use their discretion² or sanctioned the agreement when made.³ More rarely the senate treated directly with ambassadors from the enemy.⁴ The clamor of the plebeians sometimes prevailed upon the senate to negotiate for peace;⁵ and at other times it was merely by accident that the people heard of the conclusion of a treaty.⁶ After the decemviral legislation the plebeian assembly of tribes slowly acquired the right of ratification;⁷ in fact it was not till the Second Samnite war that their vote came to be essential.⁸ Among the archives devoted to treaties and alliances, accordingly, *senatus consulta* and *plebiscites* alone are mentioned.⁹ The very fact that in the later republic the ratification of treaties belonged exclusively to the tribal assembly¹⁰ proves that it was an acquired right of the people; for we may set it down as a fixed principle that the *curiae* and the *centuries* yielded none of their prerogatives to the tribes.¹¹

As regards the right of the people to declare war a distinction must be drawn between defensive wars, which, admitting neither choice nor delay,¹² could not be referred to their decision, and aggressive wars, which were in the option of the state to undertake or avoid. Yet even in the case of offensive wars, though the approval of the people was doubtless often sought, they exercised under the kings and in the early republic no real right. When the king or magistrate felt that Rome had suffered injury from a neighboring state, he despatched an ambassador to seek reparation. If the demand was not complied with, the ambas-

¹ Cf. Livy ii. 22. 5. In 495 the consul, in pursuance of a *senatus consultum*, made peace with the Volscians at their request; Livy ii. 25. 6. In the same form Cassius the consul in 493 made peace with the Latins (Livy ii. 33. 4; Dion. Hal. vi. 18-21, especially 21. 2) and in 486 with the Hernicans; Dion. Hal. viii. 68. 4; 69. 2; Livy ii. 41; cf. Rubino, *ibid.* 266 f.

² Cf. Dion. Hal. ix. 17. 2; 59. 4.

³ Livy iii. 1. 8.

⁴ Dion. Hal. ix. 36. 2 f.; x. 21. 8.

⁵ Livy ii. 39. 9 f.

⁶ Cf. Dion. Hal. ix. 17. 2, 4.

⁷ P. 351; cf. Rubino, *Röm. Verf.* 269 ff.

⁸ On the epoch-making rejection of the Caudine treaty of 321, see p. 171, n. 5. 376.

⁹ Suet. *Vesp.* 8; Rubino, *ibid.* 261.

¹⁰ Cf. Rubino, *ibid.* 260.

¹¹ *Ibid.* 263.

¹² Cf. i. 14. 6; 36. 1. Too much stress should not be laid on this distinction, however, as the Romans always regarded their enemy as the aggressor, and assumed that every war was undertaken for the redress of grievances.

sador, calling Jupiter and the other gods to witness the injustice, added: "But we shall consult the elders in our own country concerning these matters, to determine in what way we may obtain justice." When the messenger had returned to Rome and had made his report, the king consulted the senate substantially in these words: "Concerning such matters, differences, and disagreements as the *pater patratus* of the Roman people, the *quirites*, has conferred with the *pater patratus* of the ancient Latins and of the ancient Latin peoples — which matters ought to be given up, performed, discharged, but which they have neither given up nor performed nor discharged — declare," said he to the senator whose opinion he wished first to obtain, "what you think." Then the elder thus questioned replied, "I think the demand should be enforced by a just and pious war; and therefore I consent to it and vote for it." Then the rest were asked in order, and when a majority agreed in this opinion, war was thereby voted.¹ In all this account there is no mention of the people; but afterward when the *fetialis* reached the border of the enemy's country, and pronounced the formula for the declaration of war, he included a statement that the *populus Romanus* had ordered it: "Forasmuch as the *populus Romanus* of the *quirites* have ordered that there should be war with the ancient Latins, and the senate of the *populus Romanus* of the *quirites* have given their opinion, consented, etc., I and the *populus Romanus* declare and make war on the peoples of the ancient Latins."² In this connection, as in all formulae applying to international relations, *populus* means not the assembly but the state; hence the use of the word cannot be taken as evidence of the existence of a popular right to declare war.³ Besides this formula we have in support of such a right the general statement only of Dionysius and the implied idea of Livy, referred to above,⁴ neither of which is in itself of especial weight. On the other hand the individual kings seem to have been free to make war at their discretion. The fact that peace

¹ Livy i. 32.

² *Ibid.* i. 32.

³ P. 1 f., 173. The formula is extremely ancient in origin, but it must have undergone modifications in time, as is indicated by the word *prisci* applied to the Latins. Possibly the reference to the *populus* should be similarly explained.

⁴ P. 174.

and war are represented as depending upon the character and inclinations of the king¹ further establishes the real view of the Roman historians. In a succeeding chapter² it will be made clear that not till 427 did the centuriate assembly acquire the right to declare an aggressive war; probably not till some time afterward was this right established as inalienable. Previous to that date the warriors, perhaps in a contio, were occasionally called on to give their approval, doubtless, as has been explained above,³ to increase their enthusiasm for the war.

With reference to the legislative activity of the assembly under the kings, it is necessary to call attention to the fact that among all peoples in the earlier stages of their growth law is chiefly customary.⁴ At the time of her founding Rome inherited from the Latin stock, to which her people mainly belonged, a mass of private and public customs, which, owing their existence to no legislative power, were the result of gradual evolution. Under such conditions, as in Homeric Greece, the king or chief settled disputes in accordance with these usages, though in the general belief his individual judgments came directly to him from some god. The Homeric king received his dooms — *θέμιστες* — and even his thoughts from the gods.⁵ The mythical or semi-mythical legislators of Greece, as Minos, Lycurgus, and Zaleucus, were given their laws by revelation. In like manner Numa, who may be considered a typical legislator for primitive Rome,⁶ received his sacred laws and institutions from the goddess Egeria;⁷ and Romulus, the first great law-giver,⁸ was a demi-god, who passed without dying to the dwelling-place of the immortals.⁹ Roughly distinguished, Romulus was the author of the secular law, Numa of the sacred.¹⁰ In general the Romans

¹ Cf. Livy i. 22; 30. 3; 35. 7; 38. 4.

² P. 230.

³ P. 171.

⁴ For the Indo-Europeans, see Schrader, *Reallexikon*, 655 ff.; Maine, *Ancient Law*, xv f., 2 ff.; Hirt, *Indogermanen*, ii. 522 ff. There may have been occasional legislation by the assembly in its earliest history; cf. the prohibition of the importation of wine by the Suevi (Caesar, *B. G.* iv. 2), which may have been an act of the kind.

⁵ *Il.* i. 238; ix. 98; *Od.* vi. 12.

⁶ Cic. *Rep.* v. 2. 3; Livy i. 19. 1.

⁷ Livy i. 19. 5; cf. 42. 4; Tac. *Ann.* iii. 26.

⁸ Livy i. 8. 1; Verg. *Aen.* i. 292 f.

⁹ Cic. *Rep.* ii. 10. 17; Livy i. 16.

¹⁰ On the legislation of the kings, see Voigt, in *Abhdl. d. sächs. Gesellsch. d. Wiss.* vii (1879). 555 ff.

of later time looked back to their kings, the founders of their state,¹ as the authors not only of their fundamental laws and institutions but even of their moral principles.² Doubtless the Roman view of the ancient king is an image of the republican dictatorship, of the extraordinary magistratus rei publicae constituendae, of the consul freed from his various limitations;³ but the picture, stripped of the distinctness which came with the gradual formulation of constitutional usage, is, as comparative study shows, true to the primitive condition which it aims to represent.

From this early conception the idea of human legislation gradually emerged. Not daring on his own responsibility to change a traditional usage which the people held sacred, the magistrate found it expedient to obtain their consent to any serious departure,⁴ with a view not to legalizing the proposal, but to pledging the people to its practical adoption. When and how the primitive acclamation gave way to the orderly vote of the comitia curiata cannot be ascertained from the sources.⁵ After this stage was reached, the transaction between king and people had the following form: "I ask you, quirites, whether you will consent to, and consider it right, that T. Valerius be a son to L. Titus as rightfully and legally as if born of the father and mother of the family of the latter, and that the latter have the power of life and death over the former as a father over his son. These (questions) in the form in which I have pronounced them, thus, quirites, I ask you."⁶ The magistrate brought his formulated request before the people (*legem ferre*), who accepted it (*legem accipere*); the question (*rogatio*) was directed not to the assembly as a whole but to the component citizens, who individually

¹ Livy ii. 1. 1.

² Cf. Cic. *Rep.* i. 2. 2. To the end of the republic resort was had in national crises to the numen deorum as the ultimate source of law; Cic. *Phil.* xi. 12. 28.

³ Mommsen, *Röm. Staatsr.* ii. 11.

⁴ Mommsen, *ibid.* iii. 313; cf. Jenks, *History of Politics*, 89 f.

⁵ In the preceding chapter (p. 153, 157) an attempt is made to determine under what influence the curiate organization and the systematic vote were introduced into the assembly.

⁶ Cf. Gell. v. 19. 9: "Velitis, iubeatis, uti. . . Haec ita, uti dixi, ita vos, quirites, rogo." This reference to an arrogation is quoted here merely for the sake of the formula. For further citations, see Mommsen, *ibid.* iii. 312, n. 2.

replied *ut rogas*, "yes," or *antiquo*, "no."¹ By this procedure the citizens bound themselves to the acceptance of the proposition on an oral promise, which was the strongest form of obligation known to them. Herein is involved the fundamental idea of *lex*, which was not a command addressed by the sovereign to the people or a contract between ruler and ruled, but an obligation which the citizens took upon themselves at the request of the magistrate.² The verb *iubere*, which designates the people's part (*populus iubet*) in the passing of laws and resolutions, did not originally have the meaning "to order," which belonged to it in the age of Cicero. Some have derived it from *ius habere*, "to regard as right;"³ others from *iudh*, an extension of the root *ju*, "to bind."⁴ In either case it seems to mean no more than to accept or hold as right or as binding. In its widest sense *lex* denotes any obligation which one party takes upon himself on the offer of another. In this meaning it may apply to a business contract,⁵ in which alone the obligations are reciprocal, to the instruction imposed by a superior magistrate upon an inferior,⁶ to the auspiciu which the magistrate formulates and the god accepts,⁷ to the ordinance which the subject, without being consulted, receives willingly or unwillingly from the ruler

¹ For *ut rogas*, see Livy vi. 38. 5; x. 8. 12. *Antiquo* for "no" may be inferred from the use of *antiquare* to designate the rejection of a proposal; e.g. Livy iv. 58. 14; cf. Herzog, *Röm. Staatsverf.* i. 1108, n. 4; p. 467 below.

² *Lex* may be related to *lĕgare*, *ligare*, "to bind"; Brugmann, *Gundriss*, I. i. 134; Corssen, *Aussprache*, i. 444; Herzog, *Röm. Staatsverf.* i. 112, n. 1; Lange, *Röm. Alt.* 1. 315 ("bindende Vorschrift"). Mommsen, *Röm. Staatsr.* iii. 308, n. 4, quotes J. Schmidt for the fundamental meaning of the root *leg*, "to place in order," connecting it with English "law" (cf. *θεσμός*, Gesetz); cf. Kretschmer, *Einleitung in die Geschichte der griech. Sprache*, 165; Schrader, *Reallexikon*, 657; Christ, in *Sitzb. d. bayer. Akad. d. Wiss.* 1906. 215.

³ Cf. Corssen, *Aussprache*, i. 684.

⁴ Cf. Vaniček, *Etym. Wörterb.* 227; Herzog, *ibid.* i. 116, n. 3 (Rechtsetzen). Schrader, *Reallexikon*, 657, connecting *ius* with Avest. *yaoš*, "pure," develops its meaning through (1) oath of purification in legal procedure, (2) legal procedure, finally (3) human law, right, as distinguished from *fas*; cf. Christ, in *Sitzb. d. bayer. Akad. d. Wiss.* 1906. 212 (*ius* = Skt. *yōs*). On the meaning, see further Nettleship, *Contributions to Latin Lexicography*, 497; Clark, *Practical Jurisprudence*, 16-20.

⁵ For the *leges censoriae*, see Mommsen, *Röm. Staatsr.* ii. 430.

⁶ Livy i. 26. 7: "*Hac lege duumviri creati.*"

⁷ On the *legum dictio*, see Serv. in *Aen.* iii. 89.

(*lex data*),¹ as well as to the statute established by the question of the magistrate and the affirmative answer of the citizens (*lex rogata*). The *leges* of the community, with which alone the present discussion is concerned, were distinguished as *publicae*.² A *lex* of the kind was not necessarily general,³ but applied as readily to an individual citizen⁴ as to the entire body, to a declaration of war,⁵ or the banishment of a citizen,⁶ as well as to a universal rule of conduct. In the earlier time the *lex rogata*, or simply *lex*, seems to have designated any act of an assembly, elective or judicial as well as law-making in the modern sense.⁷ But in the time of Cicero it had come to mean any act of an assembly which was neither an election nor a judicial decision,⁸ and in the latter sense the word is used in this volume.

The acceptance of a proposition by the citizens obligated themselves⁹ but not the government. The king, who retained office for life and was irresponsible, could not be held amenable to law; against a tyrannical ruler the only resource was revolution. Although the republican magistrates possessed remarkably

¹ Examples of *leges datae* are the ordinances of the kings or of extraordinary constitutive magistracies, as the *triumviri rei publicae constituendae*, municipal laws and provincial regulations established by Rome; cf. Mommsen, *Röm. Staatsr.* iii. 311 and notes.

² Law of the XII Tables, cited by Gaius, in *Orig.* xlvii. 22. 4: "Dum ne quid ex publica lege corrumpant"; Cato, *Orig.* iv. 13: "Dum exules lege publica (condemnati) et execrati"; Gaius ii. 104; *Coll.* vi. 9404, 10235; cf. Mommsen, *Röm. Staatsr.* iii. 310, n. 3; Lange, *Röm. Alt.* ii. 598 f.

³ Ateius Capito's definition in Gell. x. 20. 2: "Lex est generale iussum populi aut plebis rogante magistratu" fails to cover all cases, as Gellius immediately shows.

⁴ E.g. the granting of the *imperium* to Pompey or the recall of Cicero from exile; Gell. x. 20. 3.

⁵ Livy iv. 60. 9; cf. 58. 14.

⁶ Cato, *Orig.* iv. 13; n. 2 above.

⁷ Lange, *Röm. Alt.* ii. 598 f.; Herzog, *Röm. Staatsverf.* i. 111 ff. The election of a king was a *iussus populi*, which was equivalent to a *lex*; Livy i. 22. 1. For an election by the centuriate assembly, see Livy vii. 17. 12. The *lex curiata de imperio* was regarded strictly as an election; p. 184 ff. On judicial decisions see Lange, *ibid.* i. 629 f.; ii. 571.

⁸ Cic. *Div.* ii. 35. 74: "Ut comitiorum vel in iudiciis populi vel in iure legum vel in creandis magistratibus"; *Leg.* iii. 3. 10; 15. 33. *Iudicia populi* practically disappeared, leaving *comitia legum* and *comitia magistratuum*; idem, *Sest.* 51. 109; cf. Mommsen, *Röm. Staatsr.* iii. 326, n. 1.

⁹ The usual expression for the validity of a law is *lege populus tenetur*; cf. Cic. *Dom.* 16. 41; *Phil.* v. 4. 10; Gell. xv. 27. 4; Gaius i. 3. For further citations, see Rubino, *Röm. Verf.* 356, n. 1; Mommsen, *Röm. Staatsr.* iii. 159, n. 1, 309, n. 3.

great power, as temporary functionaries they belonged to the people, along with whom they were bound by the laws.¹

To the end of the regal period the legislative activity of the people remained narrowly restricted. The body of *leges regiae*, described as curiate by Pomponius² on the supposition that they were passed by the assembly under royal presidency,³ was little more than the *ius pontificum* — the customary religious law — with whose making the *curiae* had nothing to do.⁴ If the king wished to admit new citizens,⁵ erect public works, levy forced labor on the citizens,⁶ reform the military organization,⁷ punish a man with chains or death,⁸ make a treaty, or even declare an offensive war, no power compelled him to submit the measure to the citizens. Although he must often have found it expedient to engage their coöperation in national enterprises, or more rarely in a legal innovation,⁹ it may be stated with confidence that before the beginning of the republic the curiate assembly had not acquired the right to be consulted on any of these matters — that its slight activity in legislation and administration was a concession from the king rather than a right; for under the republic such activity, gradually increasing, belonged to the centuries and the tribes. We may accept without hesitation the

¹ Cf. Livy. ix. 34. 8-10.

² Dig. i. 2. 2. 2.

³ Ascribed to Ancus Marcius by Livy (i. 32. 2) and Dionysius (iii. 36. 2 ff.), to Romulus and his successors by Pomponius (ibid.), but destroyed in the Gallic conflagration (Livy vi. 1. 1).

⁴ Lange, *Röm. Alt.* i. 314 f.; Voigt, in *Abhdl. d. sächs. Gesellesch. d. Wiss.* vii (1879). 559; Schrader, *Reallexikon*, 657 f.

⁵ The sources uniformly represent the kings as acting alone in the admission of individuals and of entire communities to citizenship. The view of Mommsen, *Röm. Staatsr.* iii. 29, that the assembly coöperated rests upon his theory of an original popular sovereignty and of an original patrician state, neither of which has any basis in fact.

⁶ Cic. *Rep.* v. 2. 3; Livy i. 38. 7; 44. 3; 56. 1 f.

⁷ Ibid. i. 43.

⁸ Ibid. i. 44. 1; cf. especially the summary condemnation and execution of Mettius; ibid. i. 28. Livy's complaint (i. 49. 4) against Tarquin the Proud is that he decided capital cases without assessors, not that he allowed no appeal.

⁹ Lange's view (*Röm. Alt.* i. 314) that under the kings there was no legislation, except the passing of the *lex de imperio*, cannot be proved and seems unlikely. Mommsen's hypothesis (*Röm. Staatsr.* iii. 327) that under the kings the comitia were exclusively legislative, elective and judicial functions being a republican innovation, is disproved by the facts presented in this chapter. There is no reason for supposing that the republic brought to the comitia any absolutely new functions.

principle that in form if not in substance the curiae retained all the powers which they had ever actually possessed.

Judicial business, which no one has ever assumed to be a primitive function of the Roman assembly, needs no long consideration here. Among the early Indo-Europeans the settlement of disputes and the punishment of most crimes were in the hands of the families and brotherhoods; only treason and closely related offences were noticed by the state; and these cases were tried by the king in the presence of the assembly.¹ The religious ideas attaching to crime and punishment² in early Rome suggest that the priests had the same connection with these matters there as among the Celts and Germans. That condition yielded to the growing authority of the king, who is represented by the ancients as wielding an absolute power of life and death over his people and as allowing in capital cases an appeal to the assembly at his own discretion.³ From the general conception of the relation between king and assembly as established in this chapter, it is necessary to infer that if the people had any claim to a share in the jurisdiction, it must have been slight as well as vague, and one which they were in no position to enforce.

A review of the individual kings might give the impression that an act of the assembly was unessential to filling the regal office. Not only were Romulus and Tatius kings without election,⁴ but according to Livy⁵ Numa's appointment was made by the senate alone; and Servius ruled long and introduced his great reforms before his election.⁶ Tarquin the Proud to the end of his reign was neither appointed by the senate nor chosen by the people.⁷ From these four or five instances of kings who ruled without election, as well as from the fact that both the dictatorship — a temporary return to monarchy — and the office of rex sacrorum — the priestly successor to the monarch — were filled by appointment, we might

¹ Schrader, *Reallexikon*, 662.

² Greenidge, *Leg. Proced.* 298 f.

³ Cf. Livy i. 26. 8 ff.; Cic. *Mil.* 3. 7; Greenidge, *Leg. Proced.* 8, 305 ff.

⁴ Cic. *Rep.* ii. 2. 4; 7. 13; Livy i. 13. 4.

⁵ I. 17. 11. Cicero (*Rep.* ii. 13. 25), however, supposes he was elected by the people.

⁶ Cic. *Rep.* ii. 21. 37; Livy i. 41-6; Dion. Hal. iv. 8.

⁷ Livy i. 49. 3.

infer that the kingship was not elective.¹ But on the other hand the word *interregnum*, which could not have been invented in the republican period and which involves the idea of election, as well as the general custom of choosing kings among primitive European peoples, may be added to the authority of our sources² in favor of an elective monarchy in earliest Rome. The nomination of the king by the competent person was perhaps acclaimed in a *contio* in some such way as among the early Germans. Such an election, we may suppose, was in the beginning legal without further action on the part of the people. But the accession of a king was a momentous event in the life of a generation — far more important than the annual declaration of war upon a neighbor — and the advantage of a formal vote of the curiate assembly, after its institution, was obvious both to the king and to the sacerdotes; it gave to the former the solemn oral pledge of obedience from the citizens, and to the latter an opportunity to influence the proceedings through the auspices and through the manipulation of the calendar.

Under this system the king after his appointment by his predecessor or by the *interrex*, and after the acclamation in *contio* if such action took place, convoked the *curiae* on the first convenient comitial day of his reign,³ having held favorable auspices in the morning, and proposed to them a rogation⁴ in some such form as the following: "Do you consent, and regard it as just and legal, that I, whom the *populus* has designated king, should exercise *imperium* over you?" This rogation, answered affirmatively by a majority of the *curiae*, became a *lex curiata de imperio*.⁵ The informal acclamation, if it was the custom,

¹ Cf. Mommsen, *Röm. Staatsr.* ii. 6 f.

² Cf. Cic. *Rep.* ii. 13. 25; 17. 31; 18. 33; 20. 35; Livy i. 17. 10; 32. 1; 35. 1, 6; 46. 1; Jordan, *Könige im alt. Ital.* 25 ff. ³ Cf. Livy xxii. 35. 4.

⁴ Cic. *Rep.* ii. 13. 25 (Numa); 17. 31 (Tullus Hostilius); 18. 33 (Ancus Marcius); 20. 35 (Tarquinius Priscus).

⁵ The formula for the curiate law is unknown. Lange, *Röm. Alt.* i. 307 ff. 407 f., 459, 461 f., supposes that it not only pledged the people to obedience, but also defined the *imperium* and bound the king not to exceed the limitations imposed; that every constitutional modification of the *imperium* required a corresponding modification of the curiate act. Herzog, *Röm. Staatsverf.* i. 111 f., further assumes that the law contained the formula of treaty on which in his opinion the state rested,

must have disappeared in time, and the passing of the curiate law was looked upon as the election proper.¹

Concessions to the people develop into popular rights. The citizens, deeply interested in the choice of a man who for the remainder of his life was to represent their community before the gods, lead them in war, and exercise over them the power of life and death, claimed as their first active political right the *ius suffragii* in the passing of this *lex curiata de imperio*. Hence after the institution of the republic and of the *comitia centuriata*, the *curiae* clung obstinately to this inalienable prerogative.²

The development of the elective process outlined above is offered in explanation of the curious phenomenon that under the republic, while all other acts of the centuriate and tribal assemblies required no confirmation by the *curiae*, elections by these assemblies did require such a sanction. This explanation is the only one proposed which accords with the Roman interpretation of the peculiarity. According to Cicero it was pro-

and that before the age of written documents this treaty was handed down orally through the repetition of the law. Lange's theory, which runs throughout his great work, seems to rest on the single statement of Tacitus, *Ann.* xi. 22: "*Quaestores regibus etiam tum imperantibus instituti sunt, quod lex curiata ostendit a L. Bruto repetita.*" But this statement proves only that the quaestors were mentioned in the curiate law, and this circumstance is otherwise explained below, p. 189. That the law defined and limited the *imperium* is unlikely (1) because in early time, when the act had a real meaning, precise definitions were unknown; (2) because there is no evidence for it.

P. Servilius Rullus stated, evidently in his rogation, that the object of the curiate act to be passed for the decemviri provided for in his bill was "*ut ii decemviratum habeant, quos plebs designaverit*" (Cic. *Leg. Agr.* ii. 10. 26) — a formula probably copied from earlier laws. From this statement and from evidence furnished below (p. 185 f.) it is practically certain that the formula for the curiate act ran somewhat like that for an election.

¹ It is true that Cicero (p. 183, n. 2) supposes the king to have been elected by the curiate assembly, and the *imperium* to have been afterward sanctioned by the same assembly. This double vote of the *curiae* seems as improbable as it was unnecessary. We may reasonably consider the alleged first vote a mistaken inference from the later election of higher magistrates by the centuries. The assumption of an acclamation as the first stage in the process accords far better with primitive conditions.

² The people claimed that the right to elect magistrates had come down to them from Servius Tullius; Appian, *Lib.* 112 (probably from Polyb.); Livy i. 60. 4; p. 360.

vided that in the case of all elective magistrates the people should vote twice on each that they might have an opportunity to correct what they had done, if they repented of having conferred an office on any person. In the case of the censors this second vote was cast in the comitia centuriata; all other elective magistrates received it in the curiate assembly.¹ Rubino² and others have objected that Cicero's interpretation of the curiate law is biassed by his desire to contrast the essentially antipopular character of the demagogue Rullus,³ who by the terms of his agrarian law would deprive the people of their right to vote even once in the election of officials, with the wise and moderate statesmen of old, who were so devoted to the people as to allow them two opportunities to express their choice in the case of each magistrate. The orator, it is urged, could not himself know the original intention of the usage; and his interpretation is contradicted by the fact that the person who proposed the *lex curiata* was already a magistrate, the voting on this *lex* being subsequent to the election and forming no part of it.⁴

In favor of Cicero's interpretation it may in the first place be stated that he was not simply offering a conjecture as to the original intention of the usage, but was interpreting the formula of the law as it existed in his own day. There would be no point to his interpretation unless the formula ran somewhat like that of an election; and he affirms definitely that the law bestows the magistracy upon a person who has already received the same office from other comitia—that it is, in other words, a second bestowal of the office.⁵ That this interpretation is not a mere invention of Cicero is proved by a statement of Messala⁶ that

¹ Cic. *Leg. Agr.* ii. 11. 26: "Maiores de singulis magistratibus bis vos sententiam ferre voluerunt. Nam cum centuriata lex censoribus ferebatur, cum curiata ceteris patriciis magistratibus, tum iterum de eisdem iudicabatur, ut esset reprehendendi potestas, si populum beneficii sui paeniteret"; cf. 10. 26; *Rep.* ii. 13. 25.

² *Röm. Verf.* 361 f., 379 f. For a summary of the various modern views, see Nissen, *Beitr. zum röm. Staatsr.* 42-6.

³ P. 435.

⁴ It is not probable that an official could pass the law for a colleague, the intention being that each higher magistrate should personally propose and carry it for himself; cf. Mommsen, *Röm. Staatsr.* i. 610, n. 2.

⁵ *Leg. Agr.* ii. 10. 26: "Hoc inauditum et plane novum, ut ei curiata lege magistratus detur, cui nullis comitiis ante sit datus."

⁶ In Gell. xiii. 15. 4: "Magistratus . . . iustus curiata datur lege."

the magistracy in the strict legal sense of the term is granted by the curiate law. And the point maintained by Messala is further confirmed by that article of the agrarian rogation of P. Servilius Rullus which provides that the decemviri agris assignandis may, if necessary, dispense with the curiate law and yet be "decemvirs in as legal a sense as are those who hold the office according to the strictest law."¹ In other words, the person who has been elected by the comitia centuriata or tributa is a magistratus, though not a magistratus iustus or optimo iure (optima lege); the completion of all formalities, ending with a second election (by the curiae), is essential to the latter.

Optimo iure requires explanation. It often signifies "with perfect justice," "most deservedly."² Closely related to this meaning is that of "perfect formality," as in making a bequest³ or in creating a sacerdos⁴ or a magistrate.⁵ In this sense optimo iure is interchangeable with optima lege. Developed in another direction, either phrase readily gives the idea of completeness or perfection of title, not only to property,⁶ but also to office.⁷ One who holds a perfect title to a property, or has

¹ In Cic. *Leg. Agr.* ii. 11. 29: "Tum ii decemviri, inquit, eodem iure sint, quo qui optima lege." In keeping with this statement is the object of the curiate act as given by the Servilian rogation (p. 183, n. 5).

² Plaut. *Most.* 713; Cic. *Off.* i. 31. 111; 42. 151; *Fin.* iv. 12. 31; *Rep.* iii. 17. 27; *Cat.* i. 9. 21; *Sest.* 43. 94; *Planc.* 36. 88; *Marc.* 1. 4; *Fam.* iii. 8. 6; *Att.* xv. 3. 2.

³ Gaius ii. 197: "Proinde utile sit legatum atque si optimo iure relictum esset; optimum ius est per damnationem legati." It is clear that this statement refers merely to the form.

⁴ Fabius Pictor, in Gell. i. 12. 14: "Uti quae optima lege fuit, ita te, Amata, capio."

⁵ Cic. *Phil.* xi. 12. 30: "Senatui placere C. Cassium pro consule provinciam optinere, ut qui optimo iure eam provinciam optinuerit" (with all the formality usual in cases of appointment to that province); v. 16. 44: "Sit (Caesar) pro praetore eo iure quo qui optimo."

⁶ Cic. *Har. Resp.* 7. 14 (reference is to the complete and perfect title with which Cicero holds his dwelling); *Phil.* ix. 7. 17 (a burial place granted by the state to a family with a perfect title); *Lex Agr.* (*CIL.* 200) 27: "Is ager locus domneis privatus ita, ut ei quod optima lege privatus est, esto."

⁷ *Lex Col. Gen.* (*CIL.* ii. Supplb. 5439) 67: "Quicumque pontif(ices) quique augures c(oloniae) G(enetivae) I(uliae) post h(anc) l(egem) datam in conlegium pontif(um) augurumq(ue) in demortui damnative loco h(ac) lege lectus cooptatusve erit, is pontif(ex) augurq(ue) in c(olonia) Iul(ia) in conlegium pontifex augurq(ue) esto, ita uti qui optima lege in quaque colon(ia) pontif(ices) auguresq(ue) sunt erunt"; ch. 66: "Ei pontifices c(oloniae) G(enetivae) I(uliae) sunt, . . . ita uti qui optima lege optimo iure in quaque colon(ia) pontif(ices) augures sunt erunt."

been granted a civil status¹ or an office² in a perfectly legal way, necessarily enjoys all the immunities, honors, and powers inherent in such absolute condition. To indicate that due legality has been observed in the creation of a magistrate, and that the latter has accordingly complete possession of his office, and of all the honors and powers belonging to it, the phrase *ut qui optima lege sunt, erunt* is often inserted in the formula of appointment or election. These words continued to be used, for example, in the creation of the dictator as long as his power remained absolute, but after it became subject to appeal, they were dropped.³ The author of the act was at the same time author of the condition attaching to it expressed by the phrase under consideration: in the appointment of a dictator it was the consul; in the creation of a promagistrate or the assignment of a province it might be the senate.⁴ Laws must often have contained provisions that the magistrates created under them should be *ut qui optima lege*.⁵ The Servilian bill most probably included an article of the kind for the *decemviri agris adsignandis* to be elected under it. But as the title to an office was impaired by any informality in the elective process, and as Servilius foresaw that the *lex curiata* might be prevented by tribunician intercession or other cause, he inserted in his bill a further provision, referred to above,⁶ that the *decemviri* might be officials *optima lege*⁷ even without the curiate sanction.

Optima lege refers to the perfection of their right to the sacerdotal places (cf. 67 above), whereas *optumo iure* seems to apply to the privileges and honors attaching to these positions.

¹ Papinian, in *Dig. iv. 4. 31* (slaves manumitted in the way here described were exempt from payment to maintain their freedom, on the ground that they were emancipated in a perfectly legal way — *optimo iure*); *Lex Salp. (CIL. ii. 1963) 28*: "*Ut qui optumo iure Latini libertini liberi sunt erunt*" (Just as are, or shall be, Latin freedmen or freemen of best standing); *Cic. Verr. II. v. 22. 58*: "*Quae colonia est in Italia tam bono iure, quod tam immune municipium, quod . . . sit usum.*"

² *Lex Col. Gen. 67*, quoted in n. above.

³ *Fest. 198. 32*; cf. *189. 21*. Applied to the censor, dictator, and interrex in *Livy ix. 34. 10–12*, it has reference not to amount of power but length of office.

⁴ See p. 186, n. 5.

⁵ As the *Lex Col. Gen. 66 f.*; p. 186, n. 1 above.

⁶ P. 186.

⁷ *Magistratus optuma lege* is the same as *magistratus iustus*; cf. *Messala, p. 185, n. 6*. In this connection *iustus* does not signify legal as opposed to illegal, but legally or technically perfect, correct; cf. for the meaning "proper," "perfect," *Cic. Fam. ii. 10. 3* (*iusta victoria*); *Caes. B. G. i. 23* (*iustum iter*); *Livy i. 4. 4* (*iusti cur-*

From what is here said it is clear that the condition of *iustus* or *optima lege* was not obtained for a magistrate by the passing of the curiate act alone, but rather by due attention to all formalities,¹ which were brought to completion by that act.

The formula for the curiate law, in addition to its resemblance to that for elections, must have contained some reference to the *imperium*, as we may infer from the frequent designation of the law as a *lex de imperio* by Cicero. From this phrase modern writers infer that the curiate act conferred the *imperium* upon newly elected magistrates. The question whether it granted to a magistrate powers which he did not already possess will be considered below. For the present it is enough to state that in no instance do the ancients speak of "conferring" the *imperium* by the curiate law or of deriving the *imperium* from that law by any process whatsoever. But mention is made of conferring the *imperium* by a decree of the senate or by the suffrages of the people in the centuriate or tribal assembly² and of *confirming* it by the curiate law.³

sum amnis); xxxix. 2. 8 (*iusto proelio*). When Cicero (*Red. in Sen.* 11. 27), accordingly, speaks of the *comitia centuriata* as the *iusta comitia*, he does not imply that the other *comitia* and their acts lack legality, but rather that they carry less weight; and when as late as 300 the patricians claimed that they alone had *iustum imperium et auspicium* (Livy x. 8. 9), they could only mean that their right to these powers was better established than that of the plebeians. C. Flaminius, consul in 217, possessed *imperium*, which he was actually exercising over his troops, but which was not *iustum*, for he had neglected the auspicial formalities appropriate to the entrance upon the consulship (Livy xxii. 1. 5). It would be wrong, however, to suppose with Nissen, *Beitr. z. röm. Staatsr.* 51, that he commanded on the sufferance only of his soldiers.

¹ Including the auspices; see n. above.

² The usual expression is "*de suo imperio curiatam legem tulit*," or "*populum consuluit*;" Cic. *Rep.* ii. 13. 25; 17. 31; 18. 33; 20. 35; 21. 38; Livy ix. 38. 15. According to Cicero, *Phil.* v. 16. 45, the senate grants the *imperium* to Octavianus, a private citizen. The interrex, who could not have had a curiate law, nevertheless possessed *imperium* (Livy i. 17. 5 f.), and the absolute *imperium* was granted by a decree of the senate (Livy iii. 4. 9; Sall. *Cat.* 29; *Hist.* i. 77. 22). See also Cic. *Leg.* iii. 3. 9: "*Imperia, potestates, legationes, quom senatus creverit populusve iusserit, ex urbe exeunto*;" *Leg. Agr.* ii. 7. 17: "*Omnes potestates, imperia, curationes ab universo populo proficisci convenit*" (reference cannot here be to the curiate assembly, which in this connection Cicero does not recognize as the people). For the centuriate assembly, see Livy xxvi. 18. 9: "*Omnes non centuriæ modo sed*

³ Cic. *Leg. Agr.* ii. 11. 27: "*Curiatis eam (potestatem) comitiis . . . confirmavit*."

The consuls and the praetor were elected by the centuries, and their imperium was sanctioned by the curiae. The dictator, too, was obliged to carry a curiate law.¹ But the quaestors, the curule aediles, and other inferior magistrates, after their election by the tribes, did not themselves convoke the curiae for sanctioning their election; the lex was proposed in their behalf by a higher magistrate.² As the origin of this custom we may suppose that the kings, and after them the higher magistrates of the early republic, used to ask the people

etiam homines P. Scipioni imperium esse in Hispania iusserunt;” 22. 15: “Centuriam vero iuniorum seniores consulere voluisse, quibus imperium suffragio mandarunt.” For the tribal assembly, see T. Annius Luscus, *Orat. adv. Ti. Gracch.* in Fest. 314. 30: “Imperium quod plebes . . . dederat.” It is a fact, too, that the tribal assembly had power to abrogate the imperium; Livy xxvii. 20. 11; 21. 1, 4; xxix. 19. 6; cf. p. 342, 360, 367. Also from Cic. *Leg. Agr.* ii. 11. 28 (“Vidit . . . sine curiata lege decemviros potestatem habere non posse, quoniam per novem tribus essent constituti”) we must infer that had these decemvirs been elected in the regular way, by the thirty-five tribes, they would have had the potestas without a curiate law. The phrase nullis comitiis in 11. 29 (“Si hoc fieri potest, ut . . . quisquam nullis comitiis imperium aut potestatem adsequi posset, etc.”) implies that the imperium or potestas may be obtained in more than one form of comitia — either the centuriata or the tributa. In the same paragraph he asserts that on the principle followed by Servilius, whom he is assailing, any one could obtain the imperium or potestas without the vote of any comitia, for he does not consider the comitia curiata real comitia, seeing that they have degenerated into a mere form. From these passages it is clear that Cicero believed the imperium or potestas to be conferred by the centuries or tribes and merely confirmed by the curiae.

¹ Livy ix. 38 f.; Dion. Hal. v. 70. 4: “Ὁν δὲ ἡ τε βουλὴ προέλθαι καὶ ὁ δῆμος ἐπιψηφίστη. To avoid unnecessary delay the sanctioning act was probably always kept free from the obligation of the promulgatio per trinum nundinum; Livy iii. 27. 1; iv. 14. 1; p. 396 f. below.

² The consuls proposed the curiate law for the quaestors; Tac. *Ann.* xi. 22. That these inferior officials required the law is further indicated by Cic. *Phil.* ii. 20. 50. For the lower functionaries in general, see Gell. xiii. 15. 4. The agrarian rogation of Servilius Rullus provided that the praetor should propose the law for the decemviri agris adsignandis required for the administration of his measure; Cic. *Leg. Agr.* ii. 11. 28.

That the magisterial helpers who were in need of the curiate law included not only the quaestors but also the lictors seems to be indicated by Cic. *Rep.* ii. 17. 31: “Ne insignibus quidem regiis Tullus nisi iussu populi est ausus uti. Nam ut sibi duodecim lictores cum fascibus anteire” (the remainder of the sentence is missing). Dion. Hal. ii. 62. 1 ascribes the introduction of the lictors to Tarquin the Elder. This curiate law, however, may not be thought of by Cicero and Dionysius as a mere sanction, but rather as a legislative act which called the lictors into being; cf. Mommsen, *Röm. Staatsr.* i. 372, n. 1, 613, n. 1.

for a pledge of loyalty not only to themselves but also to their assistants, and that this custom continued even after they had come to be elective magistrates. To functionaries who lacked the imperium the expression *lex de imperio* could not apply; *lex de potestate*, though not occurring in our sources, would be the appropriate phrase.

It has generally been assumed that the curiate law bestowed a power in addition to that received through election.¹ Something can in fact be said in favor of this view. We are told that the newly elected magistrate could attend to no serious public business till he had secured the passage of the act:² till then the praetor could not undertake judicial business; the consul could have nothing to do with military affairs³ or hold comitia for the election of his successor.⁴ Some of Cicero's contemporaries asserted that a magistrate who failed to pass the law could not as promagistrate govern a province.⁵ Or if without a curiate law he made the attempt, he would be obliged to conduct the administration at his own expense;⁶ and if as promagistrate he gained a victory in war, he was denied a triumph.⁷ Under such conditions it might well be said that a magistrate could engage in no serious public business before he had carried for himself the sanctioning law. But practice diverged widely from these rules. An act containing a provision for the election of functionaries might include a dispensing clause to the effect that the persons elected shall, in the lack of a curiate law, "be magistrates in as legal a sense as those who are elected according to the strictest forms of law."⁸ Yet even without this special provision the magistrate regularly

¹ In the opinion of Lange, *Röm. Alt.* i. 300 ff., the election conferred potestas only, the *lex curiata imperium*.

² Dio Cass. xxxix. 19. 3.

³ *Ibid.*; Cic. *Leg. Agr.* ii. 12. 30: "Consuli si legem curiatam non habet, attingere rem militarem non licet;" Livy v. 52. 15: "Comitia curiata, quae rem militarem continent." These statements, however, are not, as some have imagined, to the effect that the *lex curiata* confers military power upon the magistrate.

⁴ Dio Cass. xli. 43. 3.

⁵ Cic. *Fam.* i. 9. 25.

⁶ Cic. *Att.* iv. 18. 4: "Appius sine lege suo sumptu in Ciliciam cogitat."

⁷ *Ibid.*

⁸ Such an article in favor of the decemviri agris adsignandis appeared in the Servilian agrarian rogation of 63; Cic. *Leg. Agr.* ii. 11. 29; cf. p. 186.

attended to much business before passing the law. The first public act of the consul, praetor, or other magistrate was to take the auspices, to determine whether his magistracy was acceptable to the gods;¹ and another auspication was held for the meeting of the curiae.² It was customary, too, for the consul to make his vows to the Capitoline Jupiter and to hold a session of the senate, both of which acts had to be auspicated.³ These facts disprove the theory that the curiate law conferred the auspiciu. In the first session of the senate here mentioned not only religious affairs but civil and military matters of great importance were discussed and finally arranged, all of which business was regularly managed without a curiate law.⁴ As to other administrative acts it is probable that the want of a lex curiata never hindered the performance of necessary business civil or military. In case of danger to the state the interrex, who wholly lacked the curiate law, or the consul before passing the law could doubtless take command of the army;⁵ and it is significant that the unlimited imperium and iudiciu were granted the magistrates not by the curiae but by the senate.⁶ The law was indeed considered indispensable to the dictator in 310.⁷ It is generally assumed by the moderns that C. Flaminius, consul in 217, lacked the law;⁸ their reason is the statement of Livy⁹ that he entered upon his office not at Rome but at Ariminum. The fact, however, that in this year he carried a monetary statute before his departure for

¹ According to Dion. Hal. ii. 5 f., those who are entering upon an office pass the night in tents and in the morning under the open sky take the auspices. Livy, xxi. 63. 10, states that the consul dons his official robe in his own house, but neither he nor any other authority intimates that the public auspices were taken in his private house, as Mommsen, *Röm. Staatsr.* i. 616, asserts.

² Livy ix. 39. 1.

³ Ibid. xxi. 63. 9; Varro, in Gell. xiv. 7. 9.

⁴ Rubino, *Röm. Verf.* 365 ff.

⁵ Mommsen, *Röm. Staatsr.* i. 612, n. 1.

⁶ Sall. *Cat.* 29: "Ea potestas per senatum more Romano magistratui maxuma permittitur, exercitum parare, bellum gerere, coercere omnibus modis socios atque cives, domi militiaeque imperium atque iudiciu summum habere; aliter sine populi iussu nullius earum rerum consuli ius est;" *Hist.* i. 77. 22: (The senate decreed) "uti Appius Claudius cum Q. Catulo pro consule et ceteris quibus imperium est, urbi praesidio sint operamque dent, ne quid respublica detrimenti capiat." The interpretation which includes the interrex, Appius Claudius, with those who possessed the imperium is confirmed by Livy i. 17. 5 f., who informs us that the imperium of an interrex lasted five days.

⁷ Livy ix. 38 f.

⁸ Cf. Nissen, *Beitr. z. röm. Staatsr.* 51 f.

⁹ XXI. 63. 5 ff.

the war¹ proves that he began his official duties at Rome, and that Livy's tirade to the contrary is empty rhetoric. Probably because he departed without attending to the usual auspices, his political opponents were unwilling to admit that he had entered on his office. But the army obeyed his command, his name remained in the fasti as consul, and his monetary law continued in force. Livy, while complaining at length of his failure to take the auspices, says nothing of the curiate law. His silence is significant.² We cannot be certain that the lex curiata was not passed in his case; but we have no right to imagine that it was not and then draw far-reaching deductions from our fancy.³

A more valuable instance is that of L. Marcius, elected proprætor by the army in Spain in 212.⁴ Although he could not have had a lex curiata, the senate, while censuring the election because it transferred the auspices to the camp, did not make the want of the law a ground for declaring the magistracy illegal.⁵ A still more famous case is that of the magistrates of the year 49, who with the Pompeian party fled from Rome before carrying a lex curiata, and yet were not prevented by this circumstance from holding military commands during their year of office or from continuing in command into the following year as promagistrates.⁶ A further instance is that of Pomptinus, prætor in 63, who had no curiate law; nevertheless as proprætor in 61 he governed Narbonensis where he gained a victory over the Gauls. This fact, too, is evidence that the want of the law did not in practice debar from military commands. From 58 to 54 he waited outside the

¹ Fest. 347. 14; p. 336 below.

² Cf. Livy xxii. 1. 5 ff.

³ Nissen, *ibid.*, supposes, too, that Appius Claudius, consul in 179, went to the army without a curiate law and for that reason the soldiers refused to obey him; Livy xli. 10. Livy mentions the neglect of other formalities, but makes no reference to the curiate act.

⁴ Livy xxv. 37. 5 f.; cf. xxvi. 2. 1.

⁵ *Ibid.* xxvi. 2. 2.

⁶ Dio Cass. xli. 43. In this instance the senate had conferred dictatorial power upon the magistrates by its supreme decree (Caesar, *B. C.* i. 5); that they were constitutionally in command, whereas the general direction of affairs by Pompey, however autocratic, was only informal, is expressly stated by Dio Cass. xl. 43. 5. What Nissen, *Beitr. z. röm. Staatsr.* 53 f., says of these magistrates' lack of military imperium is therefore baseless.

gates of Rome for a triumph. The senate would not grant it and some of the magistrates opposed his effort to obtain it. The privilege was at last given him by the comitia under praetorian presidency.¹ Although the want of the law involved him in inconvenience, he finally accomplished his purpose without it. Appius Claudius, consul in 54, insisted that, should he fail to carry the sanctioning act, he should nevertheless, since he was in possession of a province decreed the consuls of his year in accordance with the Sempronian plebiscite, have imperium by virtue of a Cornelian statute until such time as he should re-enter the city.² The law of Sulla, to which he referred, probably stated simply that the promagistrate was to retain his imperium till his return to the city, without mentioning the curiate law; and for that reason Appius believed the sanctioning act to be unnecessary. Cicero, who informs us of this matter, inclines to the interpretation of Appius. Our conclusion, accordingly, is that in practice, if not in legal theory, the *lex curiata*, however convenient it may have been, was not essential to the government of a province or to a military command. It remains to consider whether it was indispensable to the holding of comitia centuriata for elections. The same Appius Claudius maintained that though a curiate law was appropriate to the consul, it was not a necessity,³ implying that without the law he was competent to perform all the functions of that office. He and his colleague, therefore, who was equally without the law,⁴ were ready to hold comitia for the election of successors; and although party complications opposed the election, no one objected to it on the ground that the consuls were incompetent; for postponing the election they resorted to auspical obnuntiations⁵ and to prosecutions of the candidates for bribery.⁶ Their competence to hold the elective comitia is further established by the senate's desire that they

¹ Cic. *Att.* iv. 18. 4; *Q. Fr.* iii. 4. 6; Dio Cass. xxxvii. 47; xxxix. 65. The praetor was Ser. Sulpicius Galba.

² Cic. *Fam.* i. 9. 25; cf. *Q. Fr.* iii. 2. 3; p. 417 below.

³ Cic. *Fam.* i. 9. 25: "Appius . . . dixit . . . legem curiatam consuli ferri opus esse, necesse non esse."

⁴ Cic. *Att.* iv. 17. 2.

⁵ Cic. *Att.* iv. 17. 4; *Q. Fr.* iii. 3. 2; cf. p. 111 above.

⁶ Cic. *Att.* iv. 17. 3 ff.; 18. 3; *Q. Fr.* iii. 2. 3; 3. 2 f.

should hold them at the earliest possible moment.¹ The ultimate failure of these consuls to elect successors was not owing to any one's objecting to their competence.²

Scholars have attached great weight to the case of the magistrates of 49, who with the Pompeian party, as has been stated,³ left the city before carrying a *lex curiata*. Though desiring, in the Pompeian camp at Thessalonica, to hold *comitia* for the election of successors, it was decided that the want of the law rendered the consuls incompetent for the function.⁴ But the case requires careful examination. The Pompeians had with them two hundred senators, enough in their opinion to constitute a quorum, and their augurs had consecrated a place for taking auspices; so that it was assumed that the *populus Romanus* and the entire city were now located in the camp.⁵ All these circumstances clearly imply an intention to assume a temporary transfer of the city of Rome to the camp and to conduct the government in that place on the basis of this constitutional fiction. But suddenly the execution of the plan was stopped by the plea that the consuls had no *curiate law*! The difficulty, however, was not so serious as Dio Cassius and the moderns have supposed. The assumption of the Pompeians that the city of Rome temporarily existed in the camp implied as well the existence of a *pomerium*, within which the consuls could legally have held a meeting of the *curiae*.⁶ Or in case

¹ Cic. *Att.* iv. 17. 3.

² The compact (Cic. *Att.* iv. 17. 2) made between Appius and his colleague in the consulship, 54, parties of the first part, and Memmius and Domitius, candidates for the consulship for the ensuing year, parties of the second part, that the parties of the second part in the event of their election should produce three augurs to testify that the parties of the first part had proposed and carried a *lex curiata*, or in failure to produce the witnesses should forfeit to the parties of the first part a specified sum of money, assumes, inasmuch as the evidence was not to be forthcoming till after the election, (1) that the *lex curiata* was not essential to holding the elective *comitia*, but (2) that it was highly advantageous to the promagistrate. Cicero, who often refers to the postponement of the elective *comitia* of this year, never intimates that the want of a *lex curiata* stood in the way.

Varro, consul in 216, must have found it extremely difficult, though perhaps not impossible, after carrying his *lex de imperio* in the *comitium*, to complete the consular and pretorian elections in the *Campus Martius* — all between sunrise and sunset on the same day; Livy xxii. 35. 4.

³ P. 192.

⁴ Dio Cass. xli. 43. 3. Livy, v. 52. 15, proves that the *comitia curiata* could meet only within the *pomerium*.

⁵ Dio Cass. xli. 43. 2.

⁶ Cf. Livy v. 52. 15.

they felt any scruple about the matter, the senate could have decreed the consuls a dispensation from the law for the purpose of holding the elections. That they allowed a mere formality to baulk them is out of the question. The whole situation is made clear by the understanding that the consuls themselves, or more probably Pompey, did not wish elections to be held or a civil government established in the camp; such a proceeding would have disturbed still further the discipline of the army and would have roused jealousies inimical to the cause. On this interpretation the want of a law, especially as it has the appearance of an afterthought, was a mere pretext.

We have seen promagistrates whose election to their respective offices had not been sanctioned by the curiae governing provinces and holding military commands; we have seen consuls who lacked the curiate sanction attending with less inconvenience to all their official duties. The same looseness characterized the application of the law to minor officials. The want of the sanction legally involved curule aediles, quaestors, and all other officials who lacked the right to convoke the curiae; and yet it is impossible that in 54, for instance, when the consuls failed to pass the law, the curule aediles and the quaestors should have remained inactive through the entire year without leaving in our sources some trace of the disturbance caused by the suspension of their administrative functions. Dio Cassius states that no judicial process could be undertaken before the enactment of the law; nevertheless Clodius as aedile in 56 prosecuted Milo before the people prior to the vote on the sanctioning act.¹ The quaestors entered office regularly on December 5;² and as the curiate law was carried for them by the consuls, they were necessarily in official duty for some time every year before their election could be sanctioned. It seems clear that ordinarily one curiate law was passed each year, under the joint presidency of the consuls and

¹ Dio Cass. xxxix. 19. 3. The date of the trial was Feb. 7, 56; Cic. *Q. Fr.* ii. 3. 2.

² *Lex Cornelia de XX Quaest.* in *CIL.* i. 202; Cic. *Verr.* i. 10. 30; Schol. Gronov. 395. Mark Antony when quaestor performed the functions of his office through the year without the sanctioning law; Cic. *Phil.* ii. 20. 50.

praetors, for all the officials who required it.¹ If that is true, a postponement of the law, or a failure to pass it, affected all the magistrates of the year.

The question as to the meaning of this wide divergence between constitutional theory and actual practice can find an answer only in the history of the curiate assembly. For a time after the founding of the republic it remained politically important. From the institution of the plebeian tribunate (494) to the enactment of the so-called law of Publilius Volero (471) the curiate assembly elected tribunes of the plebs.² In 390, according to Livy,³ it voted the restoration of a citizen from exile. Rubino⁴ maintained that this assembly continued to be a real gathering of the people to the year after the battle of Cannae, 215, when the exigencies of the war with Hannibal brought into being a statute whereby the curiate act was passed by a vote of thirty lictors as the representatives of their respective curiae; in consequence the sanction was reduced to a formality.⁵ The passage in Festus on which his theory depends is seriously mutilated; and his attempted restoration is objectionable chiefly (1) because it required no statute to keep the people from attending the comitia curiata,⁶ (2) because without a statute a resolution of the assembly was valid, if each voting division was represented by a single person,⁷ (3) because the measure, accordingly, to be a relief to existing conditions, must have freed the commander rather than the men from the necessity of going to Rome to enact the curiate law. Whatever may be the true reading,⁸ we have a right to infer from the extant fragment

¹ It is always spoken of in the singular, the implication being that one act served for all; cf. especially Caesar, *B. C.* i. 6; Livy ix. 38. 15; Dio Cass. xxxix. 19. 3.

² Cic. Frag. A. vii. 48: "Itaque auspicio . . . tr. pl. comitiis curiatis creati sunt"; Dion. Hal. vi. 89. 1; ix. 41. 2; cf. Livy ii. 56. 2; p. 262 below.

³ V. 46. 10.

⁴ *Röm. Verf.* 381 and n. 2.

⁵ Based on his reading of Fest. 351. 34: "(Triginta lictoribus) lex curiata fertur; quod Hanni(bal in propinquitate) Romae cum esset, nec ex praesidi(is discedere liceret), Q. Fabius Maximus Verru(cosus egit per tr. pl. et Ma)rcellus cos. facere in(stituit)." . . .).

⁶ The attendance on the comitia tributa was sometimes as low as five to the tribe; Cic. *Sest.* 51. 109.

⁷ Cic. *Leg. Agr.* ii. 7. 16 f.; in connection with the preceding note and p. 127.

⁸ Mommsen's restoration is, "(Transit imperium nec denuo) lex curiata fertur, quod Hanni(bal in vicinitate) Romae cum esset nec ex praesidi(is tuto decedi pos-

(1) that in the year mentioned, owing to the nearness of Hannibal, something was done to relieve officers in the field from the necessity of coming to Rome to propose the law for themselves, (2) that the regulation was permanent.¹ It is known that the consul Q. Fabius Maximus presided at the consular elections for 214.² He and M. Claudius Marcellus, who as proconsul was at the time in command of an army, were elected.³ Down to this time the custom had probably been for men who were reelected to an office or who passed from a promagistracy to the corresponding magistracy, or the reverse, to reenact the *lex curiata*. But we may suppose that after the election of 215 Fabius, fearing that both he and Marcellus might be absent on military duty at the opening of their official year, secured the passage of a measure, most likely a *senatus consultum*,⁴ which exempted from the need of repeating the curiate law holders of the *imperium* who were making the transition above described. In consenting to the arrangement the senate was making a great sacrifice to the exigencies of the situation. For to maintain control over the commanders it had insisted that they should begin their terms with all due formality at Rome.⁵ The *lex curiata* had proved a material help to this end. But now the person already in command might continue from year to year at his

set), Q. Fabius Maximus Verru(cossus M. Claudius Ma)rcellus cos. facere in(stitu-erunt)"; *Röm. Forsch.* ii. 412; *Röm. Staatsr.* i. 613, n. 3. Bergk, *Rhein. Mus.* N. F. xix (1864). 606, with less success proposes *translatione imperii*; cf. also Herzog, *Röm. Staatsverf.* i. 679. The passage is in fact past healing, though Mommsen's reconstruction is an improvement on Rubino's.

¹ The second inference is from the present tense of the verb "*fertur*."

² Livy xxiv. 7-9.

³ *Ibid.* 9. 3.

⁴ Cf. Herzog, *Röm. Staatsverf.* i. 679. It is not to be assumed, however, that the *senatus consultum* had to be repeated at every such case of transition. Lange, *Röm. Alt.* ii. 175, 704 f., who gives the measure a wider constitutional scope, assumes that it was a plebiscite. Mommsen, *Röm. Forsch.* ii. 413, supposes that the two consuls on entering office in 214 simply omitted the curiate sanction on the ground that they already held the *imperium*, which was unlimited in duration, and that the jurists accepted this procedure as constitutional. The specific motive for this action, Mommsen asserts, was the fact that they were absent from Rome at the opening of their official year. But the truth is that they were both present (Livy xxiv. 10 f.), and had accordingly no occasion for establishing such precedent on their own responsibility. All they did in the matter, then, was to take advantage of a measure already enacted.

⁵ Cf. Livy xxi. 63; xxii. 1.

post, relieved of the need of coming to the capital, where he would be temporarily subject to senatorial control.

This provision of 215 was therefore an important step in the development of the imperium; and at the same time it tended to destroy the little importance still attaching to the curiate law. It seems to have been after this event and partly in consequence of it¹ that the comitia curiata, which had long been declining, became at last a mere formality, attended by none but three augurs as witnesses to the proceedings² and thirty lictors,³ who meekly⁴ cast the votes in obedience to the command of the presiding magistrates.⁵ It is a noteworthy fact that whereas the statesman Cicero has much to say of the curiate law, Livy and Dionysius make little reference to it. Our conclusion must be that it was more important in the late republic than in the earlier time. Probably it nearly fell into disuse after 215, to be revived some time before Cicero. Its rehabilitation was the work of the optimates, for we find the senatorial party chiefly interested in maintaining it during the age of Cicero. Since the lex curiata, subject as it was to impetrative auspices and to obnuntiations, correlated closely with the Aelian and Fufian statutes, we may reasonably connect its revival closely with their origin. Cicero⁶ tells us accordingly that the comitia curiata have continued merely for the sake of the auspices. The curtailment of the power of this assembly is analogous to the curtailment of the power of the king; as the latter was reduced, in the rex sacrorum, to a shadow continued merely for a religious purpose, the curiate comitia were likewise reduced to a shadow maintained in appearance merely for keeping up an ancient custom and for the auspices connected therewith,⁷ but in reality as a part of the religious

¹ The existence of the measure of 215 proves that the curiate assembly and curiate law were at the time something more than a mere formality.

² Cic. *Att.* iv. 17. 2; cf. p. 113, 194, n. 2. The Ciceronian passage, our only authority on this point, seems to imply a custom.

³ Cic. *Leg. Agr.* ii. 12. 30.

⁴ On the servility of the lictors, see Cic. *Verr.* ii. 29. 72; *Pis.* 22. 53.

⁵ That the comitia curiata were no longer attended by the people in the time of Cicero is attested by *Leg. Agr.* ii. 11. 27: "Curiatis . . . comitiis, quae vos non initis"; cf. n. 6.

⁶ *Leg. Agr.* ii. 11. 27. On the Aelian and Fufian statutes, see p. 116, 358 f.

⁷ Cic. *Leg. Agr.* ii. 12. 31: "Illis (comitiis) ad speciem atque ad usurpationem vetustatis per . . . lictores auspicioꝝ causa adumbratis."

machinery operated with more or less effect for controlling refractory office-holders. During the age of Cicero the senate strove to uphold its theory of the necessity of the law, while individuals in office and even the entire group of magistrates for the year looked upon it as appropriate indeed but unessential to their functions. At its best the theory could be but partially realized in practice.

Naturally the lictors never refused to vote the *lex curiata*, but it was often prevented or delayed by the intercession of the plebeian tribunes.¹ As we hear nothing of such action of the tribunes in the early republic we may well conclude that it was a late usurpation. Their veto could be offset by a special resolution of the people for dispensing the persons elected from the need of the curiate sanction.² In destroying the tribunician power Sulla, perhaps consciously, strengthened the *lex curiata* as a weapon in the hands of the senate. He did not treat the subject, however, with his usual precision; for in 54 we find Appius Claudius appealing to a Cornelian law in justification of his intention to govern a province without the sanction.³ The procedure of Appius must have robbed the sanctioning act of the little vitality which it still possessed. With the downfall of the republic it fell completely into disuse.⁴

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¹ Cic. *Leg. Agr.* ii. 12. 30: "Consulibus legem curiatam ferentibus a tribunis plebis saepe est intercessum"; cf. Dio Cass. xxxix. 19. 3.

² Cic. *Leg. Agr.* ii. 11. 29; p. 227 above.

³ Cic. *Fam.* i. 9. 25; p. 193 above.

⁴ Herzog, *Röm. Staatsverf.* ii. 905.

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CHAPTER X

THE ORGANIZATION OF THE COMITIA CENTURIATA

I. *In the Early Republic*

FROM the point of view of the Roman historians the centuriate assembly,¹ planned by Servius Tullius, came into existence at the beginning of the republic; its earliest act in their opinion was the election of the first consuls² and its earliest statute the Valerian law of appeal.³ Though they could not know precisely when it voted for the first time, they were right in understanding it to have been the basal comitia of the republic during the patrician supremacy. It may not have been instituted till some time after the downfall of the kingship,⁴ and it certainly

¹ This chapter historically follows ch. iv.

² Livy i. 60. 4. This is the first act which Livy records, and it is his opinion that the last king never consulted the people; i. 49. 3. His view harmonizes with that of Dionysius, iv. 40. 3, that Servius intended to resign his office and establish a republic, had he lived.

³ Cic. *Rep.* ii. 31. 53: "(Valerius Poplicola) legem ad populum tulit eam, quae centuriatis comitiis prima lata est." Dionysius, iv. 20. 3, supposes that Servius actually used this assembly for elections, legislation, and declarations of war, that Tarquin the Proud set aside the Servian arrangement (iv. 43. 1), which was restored at the beginning of the republic. The first of these ideas is an inference from republican usage, not based on knowledge of any definite act of the assembly in the regal period. In this matter, Soltau, *Altröm. Volksversammlung*, 264, has given him too much credit.

⁴ An objection to the view represented by Soltau, *ibid.* 270-5, that the coöperation of the army in the overthrow of Tarquin the Proud caused its immediate transformation into the comitia centuriata, is that we have no ground for accepting as historical the details of the overthrow to which he calls attention. In p. 285-96 he attempts to reconstruct the earliest constitution of the republic on the theory that the army elected the consuls (283), that for a time those who were not actually on military duty were excluded from a vote in the centuriate assembly. The sources give no information regarding such an assembly, and we have no right to assume it, at least as a regular, recognized institution, for any period however early. Lange, *Röm. Alt.* i. 465, supposes that with the founding of the republic the assembly began to diverge from the army, the two institutions having previously been identical; cf. Guiraud, in *Rev. hist.* xvii (1881). 1.

did not reach its full complement of a hundred and ninety-three centuries till more than a hundred years after that event.

Through the early republic Rome was engaged in an almost unceasing struggle for existence. The army was constantly in the field; and the consuls from the praetorium issued their commands for the protection and the government of the city. Their measures, after discussion in the council of war, they must often have submitted to the approval of the army. The military *contio* was sometimes summoned for exhorting the men,¹ for promising the reward of spoil in case of victory,² for reprimanding as well as for encouraging.³ On one occasion the master of horse, calling a *contio* of soldiers, appealed to them for protection from the dictator,⁴ and they replied with a shout that they would allow no harm to befall him.⁵ Thereupon the dictator summoned another *contio* to witness the court-martial of the rebellious officer.⁶ On another occasion the consuls asked the soldiers to decide a question by acclamation, and they obeyed.⁷ We hear of the adjournment of a meeting on the motion of a military tribune.⁸ After a victory, honors and rewards were granted by vote of the soldiers.⁹ For acclamation, the regular form of voting,¹⁰ was sometimes substituted a division of the army to right and left for the sake of silence.¹¹ A military assembly, meeting at Veii, decided upon the appointment of Camillus, then in exile, to the dictatorship, and despatched the resolution to Rome.¹² In the year 357 the consul Cn. Manlius held a tribal assembly of his troops at Sutrium, and passed in it a law which imposed a tax of five per cent on the manumission of slaves.¹³ Long afterward the army in Spain elected a *propraetor*.¹⁴ It may be that much other political business was decided by the army in the troublous times which followed the overthrow of the kings. Although such acts were valid, they were always of an exceptional nature, and they ran counter to the spirit of the constitution, which

¹ Livy ix. 13. 1.

² Livy vii. 16. 4.

³ Livy v. 28. 7; vii. 36. 9.

⁴ Livy viii. 31.

⁵ *Ibid.* 32. 1.

⁶ Livy viii. 32 f.

⁷ Livy x. 19. 11.

⁸ Livy vii. 36. 9.

⁹ *Ibid.* ch. 37, especially § 9.

¹⁰ Cic. *Fam.* xi. 13. 3; Livy vii. 37. 9; viii. 32. 1; ix. 13. 1; x. 19. 11; xxviii. 26. 12; xl. 36. 4; xlii. 53. 1; Dion. Hal. iii. 13. 1.

¹¹ Livy vii. 35. 1 f.

¹² Livy v. 46. 5 ff.

¹³ Livy vii. 16. 7; p. 297.

¹⁴ Livy xxvi. 2. 2 (211 B.C.). On the military *contio*, see also p. 140.

granted to all the citizens, not to those merely who chanced to be on military duty, a voice in the decision of such public affairs as came before the people.

It is true that the centuriate assembly, having developed from the army, showed pronounced military features. It could not be convoked within the pomerium, for the reason that the army had to be kept outside the city;¹ before the reform it met ordinarily in military array under its officers and with banners displayed;² the usual place of gathering was the Campus Martius; and no one but a magistrate cum imperio could under his own auspices convoke it for the purpose of taking a vote.³ For these reasons it was frequently, even in official language, termed exercitus.⁴ The use of this word, however, should not mislead us into supposing that the assembly was an actual army. Though Dionysius⁵ represents the first meeting as armed — a mere supposition, apparently to account for its known military features — the fact is that the citizens carried weapons to none of the assemblies.⁶ Strictly, too, the centuriate gathering was termed exercitus urbanus in contrast with the real army designated as exercitus armatus or classis procincta.⁷ The facts thus far

¹ Laelius Felix, *Lib. ad. Muc.* in Gell. xv. 27. 5: "Centuriata autem comitia intra pomerium fieri nefas esse, quia exercitum extra urbem imperari oporteat, intra urbem imperari ius non sit."

² Dion. Hal. vii. 59. 3: Συνηται δὲ τὸ πλῆθος εἰς τὸ πρὸ τῆς πόλεως Ἀρειον πεδῖον ὑπὸ λοχαγοῖς καὶ σημείοις τεταγμένον ὥσπερ ἐν πολέμῳ; p. 211. During the session Janiculum was occupied by a garrison, above which, in view of the Campus Martius, waved a flag; Dio Cass. xxxvii. 27; cf. Gell. xv. 27. 5.

³ P. 104, 140 f., 244.

⁴ *Comm. Consular.* in Varro, *L. L.* vi. 88; Livy xxxix. 15. 11; Laelius Felix, in Gell. xv. 27. 5; Fest. ep. 103; Macrob. *Sat.* i. 16. 15; Serv. in *Aen.* viii. 1. Mommsen, *Röm. Staatsr.* iii. 216, 294, n. 2, is of the opinion that the centuriate assembly was termed exercitus because it met for military exercise on the Campus Martius. But we have no evidence that the assembly ever took such exercise; in fact the drill of the proletarian mob would be hardly less ridiculous than that of the nonagenarians, both of whom had a right to vote in the assembly.

⁵ IV. 84. 5.

⁶ Mommsen, *Röm. Staatsr.* iii. 216 and n. 3.

⁷ Fabius Pictor, *Ann.* i, in Gell. x. 15. 3 f.: "Dilem flaminem . . . religio est classem procinctam extra pomerium, id est, exercitum armatum, videre; idcirco rarerent flamen Dialis creatus consul est, cum bella consulibus mandabantur." There was no objection to this flamen's seeing the comitia centuriata, but the armed centuries it was not lawful for him to see. Cf. Varro, *L. L.* vi. 93: "Alia de causa hic magistratus (quaestor) non potest exercitum urbanum convocare; censor, consul, dictator, interrex potest, quod censor exercitum centuriato constituit quinquennalem,

adduced amply warrant us in refusing to consider the voting assembly an army.

But some imagine the censorial assembly for the assessment and lustration of the citizens to have been an army.¹ For this view they rely upon Dionysius,² who states that the people came armed to the first lustrum, and upon an uncertain passage from the *Censoriae Tabulae*, quoted by Varro,³ which possibly speaks of the citizens in the lustral assembly as *armati*. If this word should be supplied in the passage, it might refer to an inspection of arms of the men of military age;⁴ but that circumstance would by no means imply that all who attended the lustrum were armed or were liable to military duty. It is certain that as the census-taking had primary reference to property for the purpose of apportioning taxes and other burdens of citizenship, those only were summoned who were legally capable of holding property in their own name. The list excluded all the men "in patris aut avi potestate," however liable they were to military duty,⁵ as well as the women and

cum lustrare et in urbem ad vexillum ducere debet." But the term *exercitus urbanus* sometimes denotes the body of men enlisted for military service from those who were ordinarily exempt; Livy xxii. 11. 9.

¹ Mommsen, *Röm. Staatsr.* iii. 265, supposes that in the original form of census-taking the citizens were so arranged in companies under their leaders as to constitute an army ready to be led against the enemy. But the only citation he offers (Dion. Hal. ii. 14, perhaps for iv. 22. 1; see n. below) has no bearing on the matter.

² IV. 22, 1: Κελεύσας τοὺς πολίτας ἅπαντας συνελθεῖν εἰς τὸ μέγιστον τῶν πρὸ τῆς πόλεως πεδίων ἔχοντας τὰ ὅπλα καὶ τάξας τοὺς θ' ἱππεῖς κατὰ τέλη καὶ τοὺς πεζοὺς ἐν φάλαγγι καὶ τοὺς ἐσταλμένους τὸν φιλικὸν ὅπλισμόν ἐν τοῖς ἰδίοις ἐκάστους λόχοις καθαρμὸν αὐτῶν ἐποίησατο.

³ *L. L.* vi. 86: "Censor . . . praeconi sic imperato ut viros vocet. . . . Omnes quirites pedites armatos, privatosque curatores omnium tribuum, si quis pro se sive pro alio rationem dari volet, vocato in licium huc ad me" (Mommsen's reading, *Röm. Staatsr.* ii. 361, n. 6). Spengel reads, "Omnes quirites, (equites) pedites, magistratos privatosque, curatores," etc., in which *armatos* does not appear.

⁴ Such an inspection by the censors, if it ever existed, must have fallen early into disuse (cf. Mommsen, *ibid.* iii. 397); but we could more reasonably suppose that the inspection of the arms and of the physical condition of the men always belonged to the officers who attended to the levy; Polyb. vi. 20.

⁵ Cf. Livy xliii. 14. 8: "Censores edixerunt . . . qui in patris aut avi potestate essent, eorum nomina ad se ederentur." The father gave the census of his son; Fest. ep. 66: "Duicensus (census of two) dicebatur cum altero, id est cum filio census;" Dion. Hal. ix. 36. 3. The son was classed according to the census of the father; Livy xxiv. 11. 7.

children.¹ All such persons were reported by the father or guardian. It included, on the other hand, many who were exempt from military service on account of age, physical condition, or want of the necessary property qualification. Hence the censorial assembly could not have been identical with the army. Furthermore the centuriate assembly was not a basis for the levy.² On the contrary, the soldiers were enrolled directly from the tribes.³ These facts warrant the conclusion that the relation between the army and the assembly must have been one of origin only; the organization of the assembly developed from that of the army, but at no time was the political assembly an army or the army otherwise than exceptionally or irregularly a political assembly. The truth is that an army regularly officiating as a political body would require for its explanation two revolutions—one to bring it into existence and another to abolish it; but of both cataclysms history is silent.

The growth of the political from the military organization was somewhat as follows. After the Romans had determined to use the centuries regularly as voting units for the decision of questions not purely military, they proceeded forthwith to extend the organization so as to include all the citizens. For this purpose the men of military age who were free from duty for the time being, or who had served the required number of campaigns—sixteen in the infantry or ten in the cavalry⁴—or who were exempt on account of bodily infirmity or for any other reason, had to be admitted to the junior centuries, thus materially increasing their number and making them unequal with one another. In a state, too, in which great reverence was paid to age the seniors could not be ignored. They were accordingly organized in a number of centuries (84) equal to that of the juniors—an arrangement which made one senior count as much as three juniors.⁵ The mechanics who were liable to skilled

¹ Cic. *Leg.* iii. 3. 7; Dion. Hal. iv. 15. 6; v. 75. 3; Gell. iv. 20. 3 ff.

² Notwithstanding Genz, *Centuriatverf.* 11; Lange, *Röm. Alt.* i. 477.

³ Polyb. vi. 20 ff. The Romans were of the opinion that the same principle held for the earliest times; Varro, *L. L.* v. 89; Dion. Hal. iv. 14; cf. Soltau, *Altröm. Volksversammlung.* 337.

⁴ Polyb. vi. 19. 2.

⁵ The five classes contained accordingly 80, 20, 20, 20, and 28 centuries respectively; cf. p. 66 f., 77; see also table on p. 210. A great difference exists between Livy and Dionysius, on the one hand, and Cicero, on the other, as to the number of

service in the army¹ were then grouped for voting purposes in two centuries, that of the smiths and that of the carpenters,² based on the two guilds in which these artisans were already organized.³ Authorities differ as to the classes with which they were associated. Livy⁴ adds them to the first class. Cicero,⁵ too, places a century of carpenters with that group, making no mention of the smiths, whereas Dionysius⁶ assigns both centuries of mechanics to the second class. The explanation of the difference of opinion seems to be that information as to this point was not contained in the censorial document from which the annalist (Fabius Pictor) drew his knowledge of the earlier comitia centuriata; the Romans knew only by tradition that the industrial centuries were associated in the assembly with one of the higher classes. The weight of authority inclines in favor of the first class, and the reason for the respectable place occupied by the mechanics is the high value placed on their service in early time.⁷ In like manner the trumpeters (tubicines, liticines) and the hornblowers (cornicines) were grouped each in a century for voting in the comitia,⁸ also on

centuries in the highest class. Cicero (*Rep.* ii. 22. 39: "Nunc rationem videtis esse talem, ut equitum centuriae cum sex suffragiis et prima classis addita centuria, quae ad summum usum urbis fabris tignariis est data, LXXXVIII centurias habebat") states that the eighteen centuries of knights, the centuries of the first class, and one century of mechanics amounted to eighty-nine, which would give but seventy to the first class. The most satisfactory explanation of this difficulty seems to be that Cicero, while professing to describe the earlier centuriate system, had in mind a formative stage of the new organization, in which the first class comprised seventy centuries; p. 67, 215, n. 2. On the number in the fifth class, see p. 66, 77, 208.

¹ P. 68.

² The two are mentioned by Livy i. 43. 3 and Dion. Hal. iv. 17. 3; vii. 59. 4. Pliny, *N. H.* xxxiv. 1. 1, speaks of a guild of coppersmiths, and Plut. *Num.* 17, refers to the same guild and to that of the carpenters, ascribing both to Numa as founder. Cicero, *Rep.* ii. 22. 39; *Orat.* 46. 156, mentions only the century of carpenters. Placing this century with the first class, he either overlooks that of the smiths or wishes to reckon it with the second class (cf. Huschke, *Verf. des Serv.* 153). As he reckons the total number of centuries at one hundred and ninety-three, he has allowed for both.

³ Plut. *Num.* 17; also n. above.

⁴ I. 43. 3.

⁵ *Rep.* ii. 22. 39; cf. n. 2 above.

⁶ IV. 17. 3.

⁷ Cf. Smith, *Röm. Timokr.* 91 f. with citations.

⁸ Cic. *Rep.* ii. 22. 40; Livy i. 43. 7; Dion. Hal. iv. 17. 3 f.; vii. 59. 5; cf. Varro, *L. L.* v. 91; Cato, in Gell. xx. 2.

the basis of their guild organizations.¹ The accensi velati, who as we are informed followed the army in civilian dress and without weapons,² also received a centuriate organization. As to the number of centuries belonging to them opinion has differed. Some, formerly including Mommsen,³ have assumed two. Livy,⁴ however, gives but one century; Cicero⁵ seems to have only one in mind; and in imperial time there was a single collegium, or century, of accensi,⁶ probably a survival of the old political group. These considerations led Mommsen to abandon his former view, to assume instead a single century of the kind; and recent writers are inclined to follow him.⁷ Lowest in rank of the supernumerary centuries was that of the proletarians.⁸ The government so designated those citizens who owned no land,⁹ and hence were poor. They were exempt from military duty, excepting in so far as they served with arms furnished by the state.¹⁰ Though few in the beginning, their number gradually increased till in the time of Dionysius¹¹ it exceeded all the five classes together. At some time in the early history of the comitia centuriata they were formed into a century and given one vote,¹² which was not counted with any class but was reported

¹ Plut. *Num.* 17, speaks of only one guild of musicians, the pipers. But the cornicines formed a guild in imperial times; *CIL.* vi. 524. The two centuries were united in the collegium aeneatorum; Fest. ep. 20; *CIL.* vi. 10220 f.; Domazewski, in Pauly-Wissowa, *Real-Encycl.* iii. 1954. ² P. 68, 80.

³ *Röm. Trib.* 137, accepted by Genz, *Centurienverf.* 3, 8; Soltau, *Altrom. Volksversamml.* 254, 317, 520, n. 1. Huschke, *Verf. d. Serv.* 172, assumes ten and includes them in the fifth class. Lange, *Röm. Alt.* i. 471, supposes the accensi to have included the entire fifth class, which in his opinion was not instituted till the beginning of the republic. ⁴ I. 43. 7.

⁵ *Rep.* ii. 22. 40: "Quin etiam accensis velatis, liticiniibus, corniciniibus, proletariis."

⁶ *CIL.* vi. 9219: "Praef(ectus) c(enturiae) a(ccensorum) v(elatorum)"; cf. Mommsen, *Röm. Staatsr.* iii. p. xi, n. 1; Ulpian, *Val. Frag.* 138, mentions the privileges of this century. A decuria of the accensi velati is referred to by *CIL.* vi. 1973; cf. Kubitschek, in Pauly-Wissowa, *Real-Encycl.* i. 136.

⁷ Cf. Mommsen, *Röm. Staatsr.* iii. 282; Kubitschek, in Pauly-Wissowa, *Real-Encycl.* i. 135 ff.; Domazewski, *ibid.* iii. 1953 f. ⁸ P. 68.

⁹ *XII Tables*, in Gell. xvi. 10. 5: "Adsiduo vindex adsiduus esto. Proletario iam civi, cui, quis volet, vindex esto."

¹⁰ Livy i. 43. 8; Dion. Hal. iv. 18. 2; Ennius, in Gell. xvi. 10. 1. ¹¹ IV. 18. 2.

¹² That there was a proletarian century, besides the accensi velati, in the comitia centuriata is proved by Livy i. 43. 8; Dion. Hal. iv. 18. 2; Cic. *Rep.* ii. 22. 40. Mommsen's attempt (*Röm. Staatsr.* iii. 237 f., 285 f.) to rule this century out of

after all the others. Dionysius¹ wrongly speaks of it as a sixth class. The existence of this century is due to the principle that no one should be excluded from the right to vote on account of poverty.²

Six supernumerary centuries have now been mentioned and the place of three — the two industrial and the one proletarian — in the voting system has been considered. With reference to the others Dionysius assigns the musicians to the fourth class, Livy to the fifth. The settlement of this question is aided by an examination into the total number of comital centuries of the fifth class. It is given as thirty by the sources.³ Assuming this to be the correct number and adding to the sum of centuries in the five classes (170) the six supernumerary centuries and the eighteen centuries of knights to be considered below, we should have in all a hundred and ninety-four, which would be one too many. In an earlier chapter, however, the conclusion was reached that there were but fourteen military centuries in the fifth class.⁴ Two of the thirty centuries assigned to that class in the comitia centuriata must therefore have been in fact supernumerary. If one was the accensi, what was the other? Most probably it was the century of the tardy described by Festus,⁵ made up at each meeting of those who came too late to vote in their own classes. Obviously all writers who apply the *discriptio centuriarum* to the army view this century, as well as that of the proletarians, with suspicion.⁶ The two centuries of the accensi and the tardy should be included among, not added to, the thirty of the fifth class.⁷ Having reached this result, it

existence has failed, notwithstanding the approval of some recent writers, as Domazewski, in Pauly-Wissowa, *Real-Encycl.* iii. 1953. Cf. Kübler, *ibid.* iii. 1521 ff.

¹ IV. 17. 2; vii. 59. 3.

² Cf. Livy i. 43. 10.

³ Cf. p. 66, 77, n. 2.

⁴ P. 77 and n. 2.

⁵ 177. 21: "Niquis scivit" centuria est, quae dicitur a Ser. Tullio rege constituta, in qua liceret ei suffragium ferre, qui non tulisset in sua, nequis civis suffragii iure privaretur. . . . Sed in ea centuria, neque censetur quisquam, neque centurio praeficitur, neque centurialis potest esse, quia nemo certus est eius centuriae. Est autem ni quis scivit nisi quis scivit."

⁶ As does Mommsen, *Röm. Staatsr.* iii. 285 f.

⁷ This view accords best with the words of Livy i. 43. 7: "In his accensi, cornicines tubicinesque, in tres centurias distributi" (they were reckoned among the thirty).

might seem advisable for us to assume no further supernumerary centuries for the fifth class, but to follow the authority of Dionysius in assigning the musicians to the fourth. Or as the trumpeters preceded the hornblowers in rank, it might be plausibly argued that the former belonged to the fourth and the latter to the fifth. In this way a compromise could be effected between Livy and Dionysius, and Livy's three supernumerary centuries of the fifth class could be explained. Absolute certainty is unattainable. The notion of Dionysius that one century of musicians voted with the seniors, the other with the juniors, and so of the mechanics,¹ is erroneous; for the seniors did not vote separately from the juniors.

In the centuriate assembly each of the six tribal troops of knights² had one vote, and was called, therefore, a suffragium. As the term *centuria* had not previously applied to these groups, it was for a time withheld from them in the *comitia*, the six divisions being known simply as the *sex suffragia*.³ Afterward as new voting groups were added to the *equites* they came to be called centuries, and thence the term extended to the old.⁴ The centuriate organization of the *comitia* did not demand the creation of *suffragia seniorum*, to correspond with the *centuriae seniorum* of the infantry, perhaps because the six votes in the *comitia centuriata* adequately represented the whole number of patricians. As the *equites* originally provided their own horses,⁵ they held their rank for life, not merely through the period of service. After the state had undertaken to furnish money for the purchase and keeping of the horses,⁶ the *eques* retained his public horse, and consequently his membership in an equestrian century, long after his retirement from active duty.⁷ The increase in the number of equestrian votes was owing to the

¹ Accepted by Huschke, *Verf. d. Serv.* 152, but rejected by Mommsen, *Röm. Staatsr.* iii. 283, n. 1.

² P. 7, 62, 74 ff. 93, 96.

³ *Cic. Rep.* ii. 22. 39: "Equitum centuriae cum sex suffragiis"; *Fest.* 334. 29. *Cic. Phil.* ii. 33. 82, is uncertain.

⁴ *Cic. Rep.* ii. 22. 39 (n. above); *Livy* i. 36. 7; 43. 9.

⁵ P. 62, 93.

⁶ P. 93.

⁷ L. Scipio Asiagenus retained his public horse till, six years after his consulship, he was deprived of it by Cato the censor; *Plut. Cat. Mai.* 18; *Livy* xxxix. 44. 1. Both censors of the year 204 had public horses; *Livy* xxix. 37. 8. The senators were *equites* and voted in the equestrian centuries as late as 129; *Cic. Rep.* iv. 2. 2; cf. Gerathewohl, *Reiter und Rittercent.* 77 and n. 2 f.

participation of plebeians in the mounted service.¹ From them twelve equestrian centuries were formed for the centuriate assembly, and added to the six groups already existing. This increase probably came about in the course of the fourth century, accompanying or following the enlargement of the infantry from two to four legions.² Thus the total number of one hundred and ninety-three centuries could not have been reached till shortly before 269.

The foregoing discussion has made it evident that from the time when the comitia centuriata came into being, there were two centuriate organizations; (1) the military, which continued as before till it changed to the manipular formation,³ (2) the political, which developed from the military but which was at no time identical with it.

DISCRIPTIO CENTURIARUM OF THE COMITIA CENTURIATA

Old centuries of knights	6
New centuries of knights	12

CLASSES	JUNIOR CENTURIES	SENIOR CENTURIES	RATINGS IN ASSES ACCORDING TO LIVY
I	40 + 2 of artisans	40	100,000
II	10	10	75,000
III	10	10	50,000
IV	10 + 2 of musicians	10	25,000
V	14 + 1 of accensi + 1 of the tardy	14	11,000

Below the classes :
1 century of proletarians

SUMMARY

Knights	18
Seniors and juniors	168
Supernumerary	7
Total	193

¹ P. 94.

² P. 96.

³ Livy viii. 8, while describing the manipular arrangement under the year 340, assigns the beginning of it to the time of Camillus, considering it due to the introduction of pay; Plut. *Cam.* 40 (for change of armor at time of Camillus); cf. Soltau, *Altröm. Volksversaml.* 278; Marquardt, *Röm. Staatsv.* ii. 332 f.; Delbrück, *Gesch. d. Kriegsk.* i. 235.

Before the reform this assembly met in military array with banners displayed, each company under its centurion.¹ The voting was oral. Probably it was at first by acclamation; if so the suggestion of individual voting, as we find it in historical time, must have come from the orderly military array, which offered itself conveniently for the purpose.² The centurions may originally have served as rogatores, to collect and report the votes.³ Each century cast a single vote, which in historical time the majority of its members decided.⁴ The voting proceeded according to classes; the equites were asked first, hence their centuries were termed prerogative (*praerogativae*), then the eighty centuries of the first class. If the votes of these two groups were unanimous, they decided the question at issue; as ninety-seven was a majority, they had one to spare from their total number. If they disagreed, the second class was called and then the third and so on to the proletarian century. But the voting ceased as soon as a majority was reached, which was often with the first class; and it rarely happened that the proletarians were called on to decide the issue.⁵ The announcement of the prerogative votes greatly influenced the action of those which followed.⁶

II. *The Reform*

The study of the centuriate assembly begun earlier in the volume⁷ and continued in the preceding part of this chapter shows it gradually developing its organization during the fifth and fourth centuries B.C. The main line of progress has been traced though details are unknown. The growth of popular rights in the latter half of the fourth century gave a great impetus to the activity of the assemblies in general, as is manifested in the Genucian, Publilian, and Hortensian legislation.

¹ Dion. Hal. vii. 59. 3 (p. 203, n. 2). There seems to be no reason for doubting this statement; cf. Herzog, *Röm. Staatsverf.* i. 1100. ² P. 157 b.

³ Lange, *Röm. Alt.* i. 563. His citations, however (Fest. 177. 27; Cic. *Orat.* ii. 64. 260), do not prove the point; Herzog, *ibid.* ⁴ Dion. Hal. iv. 21. 1; x. 17.

⁵ Livy i. 43. 11; Dion. Hal. iv. 20. 3-5; vii. 59. 3-8; x. 17. 3. On the prerogative equestrian centuries, see Livy i. 43. 8; v. 18. 1: "*Praerogativa . . . creant*" (corrupt text); x. 22. 1: "*Praerogativae et primo vocatae centuriae . . . dicebant*"; Fest. 249. 7.

⁶ Cic. *Planc.* 20. 49; *Q. Fr.* ii. 14. 4; *Div.* i. 45. 103; Fest. *ibid.*

⁷ Ch. iv.

In 312 when the change was made in the appraisements from land to money, many aerarii who had voted with the proletarians must have been advanced to the higher classes.¹ This step toward the democratization of the comitia centuriata, following upon the reduction of the patrum auctoritas to a mere formality, could not help adding new energy to the institution, leading to further changes in a popular direction. The class ratings which are known to history were established no earlier than 269.² Two other more important changes, which can be but approximately dated, must now be considered in detail. They are (1) the abolition of the equestrian prerogative and the introduction of the custom of drawing by lot a prerogative century from the first class on each occasion before the voting began; (2) the division of the citizens into classes and centuries within the several tribes. These two innovations are commonly grouped together under the name of the "reform." As they have no necessary connection with one another, they need not have been simultaneous. Livy's narrative of the happenings of 396³ and of 383⁴ seems to imply that they had been introduced before these dates.⁵ But the passages here referred to

¹ P. 64, 86 f.

² P. 86 f.

³ V. 18, 1 f.; "P. Licinius Calvus praerogativa tribunum militum non petentem creant . . . omnesque deinceps ex collegio eiusdem anni refici apparebat. . . . Qui priusquam renuntiarentur iure vocatis tribubus. . . . Calvus ita verba fecit." We might amend this evidently corrupt passage either by changing praerogativa to the plural, as do Müller (2d ed. 1888) and Weissenborn (8th ed. 1885), thus making it refer to the equestrian centuriae. At the same time we might read iis revocatis (scil. praerogativis). The passage would then apply to the Servian arrangement. Or we could bring it to the support of the reformed order by reading creat (cf. Madvig). The preferable interpretation of the qui priusquam . . . tribubus clause seems to be "Before they could be declared elected on the official reports from the tribes," the official reports being counted tribe by tribe, as will hereafter appear; p. 225. See also on this passage, Plüss, *Centurienverf.* 10 ff.; Lange, *Röm. Alt.* ii. 496. Here, as often elsewhere, Ullrich, *Centuriatcom.* 14, is wrong. But it is impossible to prove or to disprove anything by the emendation of such a passage.

⁴ VI. 21. 5: "Omnes tribus bellum iusserunt." As the tribal assembly did not declare war, this passage must refer to the reformed comitia (Lange, *ibid.*; Plüss, *ibid.* 13), unless omnes tribus is carelessly used to designate the unanimous vote of the populus Romanus. The assembly tributim mentioned by Livy vii. 16. 7 for the year 357 was tribal, not centuriate as Ullrich, *ibid.* 15, supposes.

⁵ In fact some scholars have assigned the reform to the decemvirs, 451; cf. Peter, *Epoch. d. Verfassungsgesch.* 75; Soltau, *Altröm. Volksversamml.* 361 ff.

are uncertain; and at all events they belong to a period in which the centuries may still have been closely connected with the tribes.¹ But should they be so interpreted as to apply to the reformed centuriate assembly, they might still be looked upon as historical anticipations for the reason that Livy's² account of the year 296 has reference to a feature of the old organization. This disposition of the three passages is supported by the following consideration. Had the reform been introduced much earlier than 269, the annalists would have assigned it to Servius Tullius, just as they assigned to him thirty tribes (reached in 318), all thirty-five tribes (reached in 241), and the census ratings in the sextantarian asses (established in or after 269);³ and in that case all memory of the original Servian system would have been lost. The circumstance that we are acquainted with it in some detail is proof of its survival into the third century B.C. In fact Livy's⁴ chief reference to the reform indicates that it was completed, if not undertaken, after the number of tribes had been brought up to thirty-five (241). On the other hand it came before the opening of his third decade (218), which takes the new arrangement for granted.⁵ The contention is often made that Livy must have given an account of the reform in his second decade (292-219) now lost; and there is a universal agreement that the reform was brought about not by statute, but by arbitrary censorial disposition.⁶ The censor commonly assumed to be the author of the change is either Fabius Buteo, 241, or Flaminius, 220.⁷ Against the latter may

¹ P. 77 f., 214.

² X. 22. 1: "Eumque et praerogativae et primo vocatae omnes centuriae." Praerogativae refers to the equestrian centuriae and hence to the Servian organization. It is hazardous, however, to make so much depend on a single letter; should final e be dropped from this adjective, the sentence would still read correctly.

³ P. 57 f., 66 f., 86 f.

⁴ I. 43. 12.

⁵ Cf. xxiv. 7. 12 (215 B.C.): "Eo die cum sors praerogativae Aniensi iuniorum exisset"; 9. 3: "Praerogativae suffragium iniit . . . eosdem consules ceterae centuriae . . . dixerunt"; xxvi. 22. 2 f.; xxvii. 6. 3.

⁶ Livy xl. 51 is evidence that the censors had power to make changes as extensive as these.

⁷ Mommsen, *Röm. Trib.* 108, preferred Fabius, and his view has been accepted by Lange, *Röm. Alt.* ii. 499; Herzog, *Röm. Staatsverf.* i. 326; Kübler, in Pauly-Wissowa, *Real-Encycl.* iii. 1956; Le Tellier, *Organ. cent.* 75; Willems, *Droit public Röm.* 93; Karlowa, *Röm. Rechtsgesch.* i. 384; and others. But in his *Staatsr.* iii.

be urged the silence of Polybius¹ and Livy,² who in speaking at length of his opposition to the nobles makes no reference to this reform. In favor of Fabius it may be said that in 241 the full number of tribes was completed; and the name of the thirty-fifth, Quirina, corresponding to Romilia, the first rural tribe, suggests that the Romans intended to create no more. In naming the last tribe the censors seem to have had in mind the completion of the new system, to each component part of which they apparently guaranteed a definite share of political power, which would have been impaired by the further creation of tribes.³

A little reflection, however, will convince us of the impossibility of assigning the reform to any one censor or to a definite date. Livy could not have made much of it in the lost part of his history without leaving some trace in the epitome, which mentions far more trivial matters.⁴ The only explanation of the epitomator's silence is that the reform was so gradual as to escape marked attention. This view is supported by a strict interpretation of Livy,⁵ who supposes the change to have come about naturally with the increase in the number of tribes, and of Dionysius,⁶ who ascribes the innovation, or a part of it, to no

254, n. 4, 270, n. 3, following Götting, *Gesch. d. röm. Staatsverf.* 383, he changes his preference to Flaminius on the ground that the conflict between the patricians and the plebeians continued to the war with Hannibal (Sall. *Hist.* i. 9. 11), ending, as he supposes, in the opening of the six patrician centuries of knights to the plebeians — a change which he connects with the reform under discussion. His reasoning as to the date is not cogent, and is outweighed by the consideration given in the text.

¹ II. 21.

² XXI. 63; cf. Kübler, in Pauly-Wissowa, *Real-Encycl.* iii. 1956.

³ Lange, *Röm. Alt.* ii. 499; Plüss, *Centurienverf.* 10; Le Tellier, *Organ. cent.* 73 ff.

⁴ Guiraud, in *Rev. hist.* xvii (1881). 7.

⁵ I. 43. 12: "Nec mirari oportet hunc ordinem, qui nunc est post expletas quinque et triginta tribus duplicato earum numero centuriis iuniorum seniorumque, ad institutam ab Serv. Tullio summam non convenire" (Nor need we be surprised that the arrangement as it now exists after the tribes have been increased to thirty-five, their number being doubled in the centuries of juniors and seniors, does not agree with the total number instituted by Servius Tullius).

⁶ IV. 21. 3: Οὗτος ὁ κόσμος τοῦ πολιτεύματος ἐπὶ πολλὰς διέμεινε γενεὰς φυλαττόμενος ὑπὸ Ῥωμαίων· ἐν δὲ τοῖς καθ' ἡμᾶς κεινῇται χρόνοις καὶ μεταβέβηκεν εἰς τὸ δημοτικώτερον, ἀνάγκαις τισὶ βιασθεῖς ἰσχυραῖς, οὐ τῶν λόγων καταλυθέντων, ἀλλὰ τῆς κρίσεως (οἱ κλήσεως) αὐτῶν οὐκέτι τὴν ἀρχαίαν ἀκρίβειαν καταττούσης, ὡς ἔγνω ταῖς ἀρχαιρεσίαις αὐτῶν πολλάκις παρῶν. (After this arrangement had continued many generations, carefully preserved by the Romans, it has assumed in our time a

individual but to "certain powerful forces." A conclusion as to the date of the reform, to be acceptable, must satisfy the conditions above mentioned. In earlier time, when there was a single classis, the centuries were made up within the tribes; but this simple system was rendered impossible by the increase in the number of classes.¹ For convenience of administration the censors must soon after this enlargement have begun an effort to reduce the discord to harmony. One class may have been brought into agreement with the tribes more readily than another, and thus the readaptation may have extended through many lustra. The number of centuries probably did not long remain at one hundred and ninety-three. It may have received its first increase above that sum in 304, for instance, the date to which Niebuhr² assigns the reform. The process may have been far advanced in 241, the date preferred by a majority of scholars, and completed by Flaminius in 220.³ The abolition of the equestrian prerogative may likewise have been gradual; it may have been retained in one class of comitial acts—elections or legislation, for instance—longer than in another. The conclusion that the changes were gradually introduced in the period from 304 to 220 would best explain all the known facts.⁴

As no description of the reformed organization has come down to us, we are obliged to reconstruct it from the scant

more democratic character, driven into this new course by certain powerful forces. The centuries were not abolished, but the decision of their votes has lost its former carefulness—or we may read, the calling of the centuries no longer retains its precise order. This fact, he tells us, he himself often noticed when present at elections.)

If *κπλῶews*, supported by most MSS., is retained, it should refer to the equalization of power among the classes; *κλήσεως* would probably mean that the prerogative century was now drawn by lot.

¹ P. 77 f.

² *Röm. Gesch.* iii. 374 ff.

It is not improbable that the first step was the reduction of the first class to seventy centuries, the ten centuries deducted being at the same time added to the lower classes. This view will explain Cic. *Rep.* ii. 22. 39, which otherwise must be considered a mistake; p. 67, 205, n. 5.

³ P. 213, n. 5.

⁴ Ihne, *Hist. of Rome*, iv. 12, concludes that the change was gradual. The line of development suggested by Plüss, *Centurienverf.*, however, is ill supported by the evidence. Guiraud, *Rev. hist.* xvii (1881). 1 ff., also accepts the view of a gradual reform but minimizes its importance.

references of various writers. It is to be noted first that the five classes continued in the new system.¹ They were still based on the census,² and were called to vote in their order as before.³ The distinction between juniors and seniors was retained;⁴ and as these comitia were still called *centuriata*, the centuries necessarily continued as the voting units.⁵ But the

¹ The citations below refer to a plurality of classes for the period following the reform, without mentioning a definite number; Sall. *Iug.* 86; Cic. *Rep.* iv. 2. 2; Flacc. 7. 15; *Red. ad Quir.* 7. 17; Symmachus, *Pro Patre*, 7 (Seeck); Auson. *Grat. Act.* iii. 13; ix. 44 (Peiper); p. 287, 293 (Bip.). In his speech for the Voconian law, 169, the elder Cato, in Gell. vi. 13. 3, referred to the distinction between the *classici* and those who were *infra classem*, from which we may conclude that the distinction existed in his time. The agrarian law of 111 (*CIL.* i. 200. 37) mentions the first class; also Livy xliii. 16. 14. The first and second are spoken of by Cic. *Phil.* ii. 33. 82. Ullrich's view (*Centuriatcom.*), resting on these passages, is that there were but two classes, one of seniors another of juniors. Besides involving many impossibilities, it is refuted by the frequent references to the continuance of the census as an element in the system (see note below) and by the occasional mention of the five classes. The latter number for the time of C. Gracchus is given by Pseud. Sall. *Rep. Ord.* 2. 8. This work, though late, is generally considered good authority; cf. Greenidge, *Hist. of Rome*, i. 237 f. Five are mentioned also by Gell. vi (vii). 13. 1; Serv. in *Aen.* vii. 716; Arnob. *Adv. Nat.* ii. 67, with no definite reference to a particular period. Cicero's allusion (*Acad. Pr.* ii. 23. 73) to the fifth class implies at least that the five classes were then fresh in the memory. The mention of an *amplissimus census* for the time of Cicero by Ascon. in *Pis.* 16, proves the existence of more than two classes at the time. These citations, together with the fact that no other definite number but five is ever spoken of by the ancient writers, must lead to the conclusion that there was no change.

² To the time of Marius the soldiers were still drawn from the census classes; Polyb. vi. 19. 2; Sall. *Iug.* 86. The first class was distinguished from the rest by its armor, Polyb. vi. 23. 15. That the political classes likewise rested on the census is proved by Cic. *Leg.* iii. 3. 7; 19. 44; Gell. vi (vii). 13; xv. 27. 5; Ascon. in *Pis.* 16. The agrarian law of 111 (*CIL.* i. 200. 37) implies a property qualification of the class mentioned (note above). These citations dispose of the hypothesis of Plüss, *Centurienverf.* 36 ff., 80, which represents the classes of this period as consisting of groups of tribes resting partly on the census but mainly on differences of rank.

³ Cic. *Phil.* ii. 33. 82; Livy xliii. 16. 14; Pseud. Sall. *Rep. Ord.* 2. 8; Val. Max. vi. 5. 3; (Aurel. Vict.) *Vir. Ill.* 57. 3.

⁴ Livy i. 43. 12; xxiv. 7. 12; xxvi. 22. 2 f.; xxvii. 6. 3 (p. 213, n. 5 above); Cic. *Rep.* iv. 2. 2; *Verr.* II. v. 15. 38: "Qui (praeco) te totiens seniorum iuniorumque centuriis illo honore (praetorship) adfici pronuntiavit"; *Har. Resp.* 6. 11; *Leg.* iii. 3. 7; Horace, *Ars Poet.* 341: "Centuriae seniorum agitant expertia frugis."

⁵ Varro, *L. L.* vii. 42; Cic. *Flacc.* 7. 15; *Sull.* 32. 91; *Tog. Cand.* in Ascon. 85; *Red. in Sen.* 11. 27; *Imp. Pomp.* 1. 2; *Brut.* 67. 237; *Orat.* ii. 64. 260; Ascon. 16. 95; Pseud. Sall. *Rep. Ord.* 2. 8; Livy i. 43. 12 f.; xxvii. 18. 9; 22. 4, 8, 10, 13; xxvii. 21. 4; xxviii. 38. 6; xxix. 22. 9; xxxi. 6. 3; 7. 1; xxxvii. 47. 7; xliii. 16. 14, 16; Dion. Hal. iv. 21. 3; et passim.

reform brought them into direct relation with the tribes, which now served as a basis for the division into centuries and for their distribution according to age and class. On this point Livy¹ remarks, "We ought not to wonder that the arrangement which now exists after the tribes have been increased to thirty-five, their number being doubled in the centuries of juniors and seniors, does not agree with the total number instituted by Servius Tullius; for he divided the city into four parts, . . . which he called tribes. . . . Nor did those tribes have any relation to the distribution and number of the centuries." From this passage we may infer (1) that in the reformed assembly the number and distribution of the centuries depended closely upon the tribes—a conclusion supported by other citations to be given hereafter, (2) that the number of centuries was changed, although we are not distinctly informed whether by diminution or increase. According to one interpretation the number of tribes was doubled by the number of centuries of juniors and seniors, and there were therefore seventy of these centuries, thirty-five juniors and as many seniors, each century forming a half tribe. This view is supported by passages in which the century bears the name of the tribe, as *Aniensis iuniorum*,² *Voturia iuniorum*,³ *Galeria iuniorum*,⁴ as well as by those which in a more general way refer to voting or the announcement of the votes by or according to tribes in the centuriate assembly.⁵ It accords perfectly with other evidence that

¹ I. 43. 12 f. "Nec mirari oportet hunc ordinem, qui nunc est post expletas quinque et triginta tribus duplicato earum numero centuriis iuniorum seniorumque, ad institutam ab Servio Tullio summam non convenire. Quadrifariam enim urbe divisa . . . partes eas tribus appellavit . . . neque eae tribus ad centuriarum distributionem numerumque quicquam pertinere."

² Livy xxiv. 7. 12.

³ Livy xxvi. 22. 2 f.

⁴ Livy xxvii. 6. 3.

⁵ Voting or the announcement of the votes according to tribes is indicated by Polyb. vi. 14. 7: Τοῖς γὰρ θανάτου κρινομένοις, ἐπὶ ἀν καταδικάζονται δίδωσι τὴν ἐξουσίαν τὸ παρ' αὐτοῖς ἔθος ἀπαλλάττεσθαι φανερώς, κὰν ἔτι μία λείπηται φυλὴ τῶν ἐπικυρουσῶν τὴν κρίσιν ἀψιφόρητος, ἐκούσιον ἑαυτοῦ καταγόντα φυγαδεύειν. (To those who are on trial for life, while the vote of condemnation is being taken, even if a single tribe of those whose suffrages are needed to ratify the sentence has not voted, the Roman custom grants permission to depart openly, condemning themselves to voluntary exile.) This procedure must have been in the comitia centuriata, and hence the votes of the centuries must have been taken or announced by tribes; cf. Klebs, in *Zeitschr. d. Savignyst.* xii (1892). 220; Plüss, *Centurienverf.* 14. See

the century was an integral part of the tribe.¹ This is the view adopted by Niebuhr.² It is open, however, to the fatal objection of abolishing the classes, which in fact continued through the republic, as has already been shown.³ He does indeed allow for a first class comprising the country tribes and a second class made up of the others;⁴ but this hypothesis is

also Cic. *Leg. Agr.* ii. 2. 4: "Meis comitiis non tabellam vindicem tacitae libertatis, sed vocem [unam] prae vobis indicem vestrarum erga me voluntatum ac studiorum tulistis. Itaque me non extrema tribus (not diribitio) suffragiorum, sed primi illi vestri concursus, neque singulae voces praeconum, sed una vox universi populi Romani consulem declaravit." The MSS. have tribus and there is nothing against it, though Müller, following Richter, has adopted diribitio for the Teubner text, 1896. The meaning is "In my election you offered not merely the ballot, the vindication of your silent liberty, but also your unanimous voice as evidence of your good will to me and of your eagerness in my behalf. Hence it was not the last tribal group of votes but your first coming together, not the single announcements of the criers but the unanimous voice of the entire Roman people which declared me consul." From this passage we may infer (1) that the votes were cast or announced by tribes, (2) that the tribe cast more than one vote, (3) that the result was sometimes known before the last tribe was reached. Cf. further Cic. *Phil.* vi. 5. 12; 6. 16; xi. 8. 18; Livy v. 18. 2; vi. 21. 5; viii. 37. 12; xxix. 37. 13; ep. xlix; Oros. v. 7. 1; Lucan, *Phars.* v. 391 ff.; Plut. *Cat. Min.* 42.

¹ Cic. *Planc.* 20. 49: "Unius tribus pars" (i.e. the prerogative century); Pseudacr. Schol. Cruq. ad Hor. *Poet.* 341: "Singulae tribus certas habebant centurias seniorum et iuniorum"; Livy i. 43. 12 f. implies that the number of centuries was a multiple of the number of tribes, in other words that the century was an integral part of the tribe; cf. Q. Cic. *Petit.* 5. 17 f.; 8. 32; Mommsen, *Röm. Trib.* 74. The most convincing evidence is that of inscriptions of the imperial period (p. 220) which prove the urban tribes to have comprised each an integral number of centuries. Mommsen, *Röm. Staatsr.* iii. 274, has therefore failed in his attempt to limit to the first class the division of the tribes into centuries.

² *Röm. Gesch.* iii. 382 f., followed by Plüss, *Centurienverf.* 23 ff. Niebuhr places the change in 304, when there were but thirty-one tribes, which would give for that date but sixty-two half-tribe centuries.

³ P. 216.

⁴ Niebuhr, *ibid.* His authorities for the two classes are Livy xliii. 16. 14: "Cum ex duodecim centuriis equitum octo censorem condemnassent multaeque aliae primae classis"; Cic. *Phil.* ii. 33. 82: "Prima classis vocatur, renuntiatur; deinde, ita ut adsolet, suffragia; tum secunda classis vocatur; quae omnia sunt citius facta, quam dixi. Confecto negotio bonus augur . . . alio die inquit"; cf. p. 113. In the Livian citation, however, the mention of only the first class affords no hint as to the number of classes to follow; and the keen analysis of the Ciceronian passage made by Huschke, *Verf. des Serv.* 615 and n. 8, proves confecto negotio to signify not necessarily that the voting had been finished, but rather that the comitia had advanced so far as to preclude the obnuntiatio. It should be served before the assembly convened, not after the meeting began ("Non comitiis habitis, sed priusquam habeantur"; § 81). Confecto negotio, equivalent to comitiis habitis, is the negative of

overthrown by those citations which imply the continuance of all five classes,¹ as well as by those which make the census an element of the later organization.² Huschke,³ who places the reform in the earliest times of the republic, adopts Niebuhr's view as to the number of centuries; but maintaining the continuance of the five classes,⁴ he considers them to be groups of tribes, the seventeen old rural tribes being distributed as follows: in the first class eight, in the second, third, and fourth respectively two, in the fifth three.⁵ But bearing in mind that these tribes were primarily local, we cannot at the same time regard them as census groups without ascribing to them an impossibly artificial character. For this reason the theory of Huschke should be rejected. To avoid this difficulty, while retaining the classes, the assumption has been made that the classes were subdivisions of the century, in other words that each century contained men of every class. This view is invalidated by the fact that the centuries continued to be divisions of the classes, which were still called to vote in their order.⁶

The assumption of a diminution in number having proved untenable, the conclusion is that there was an increase.⁷ In view of the facts (1) that the reformed organization rested on a tribal basis,⁸ (2) that the centuries were divisions not only of the tribes⁹ but also of the classes,¹⁰ (3) that the tribes could not have been divisions of the classes,¹¹ it is necessary to conclude that the classes were themselves divisions of the tribes with the centuries

priusquam habeantur. This interpretation deprives the theory of two classes, held by Niebuhr, Ullrich, and others, of its only support.

¹ P. 216, n. 1. ² P. 216, n. 2. ³ *Verf. des Serv.* 623. ⁴ *Ibid.* 617 ff.

⁵ *Ibid.* 634. Similar is the view of Plüss, *Centurienverf.* 36 ff., 80, that for the period 179-86 the classes were groups of tribes based partly on the census and partly on social rank.

⁶ P. 216, n. 3. The long-known hypothesis here mentioned was sufficiently refuted by Huschke, *ibid.* 619 ff., but has been more recently revived by Madvig, *Röm. Staat.* i. 117 ff., who, however, so develops it as to make the five classes voting divisions of the century. This notion is controverted by Genz, *Centuriatcom. nach. der Ref.*, and defended without success by Gerathewohl, *Reit. und Rittercent.* 90 f.

⁷ This result is in fact suggested by the passage in Livy 1. 43. 12 f. (p. 217, n. 1); it is not to be wondered at that an increase in the tribes should bring about an increase in the centuries — a diminution in the centuries could not be spoken of in the same way. ⁸ P. 217. ⁹ P. 218, n. 1. ¹⁰ P. 216, n. 3. ¹¹ ¶ above.

as subdivisions. In other words, the work of organization took place within the tribe: the members of a tribe were first divided into five classes according to their wealth; within each class the men were grouped on the basis of age into juniors and seniors,¹ one century for each within the several classes, making ten centuries of juniors to the tribe, or in all three hundred and fifty tribal centuries, to which are to be added eighteen centuries of knights and probably five supernumerary centuries, amounting to a total of three hundred and seventy-three. This is substantially the view of Pantagathus.² Convincing evidence is afforded by a group of inscriptions of the imperial period.³ From them we learn that under the emperors the urban tribes comprised severally (1) a *corpus seniorum*, (2) a *corpus iuniorum*, (3) the *tribus Sucusana* a *corpus Iulianum*, and the Palatine and Esquiline each a *corpus Augustale*. Every *corpus* consisted of several centuries. In the *corpus Sucusana iuniorum* were eight centuries divided into two groups of five and three respectively, the first group being evidently superior to the second. At the head of the century was a *centurio* or *curator*.⁴ Eliminating the *corpora* which were named after emperors and which must have been instituted in their time, eliminating also the inferior centuries of the *corpora seniorum* and *iuniorum*, which were undoubtedly added either by the emperors or by the late republican censors, we have remaining five centuries to the

¹ P. 216, n. 4.

² A monk who lived 1494-1567. For his view see Drackenhorch's commentary on Livy i. 43. To the 350 centuries of juniors and seniors he added 35 or 70 centuries of knights and a century of proletarians, making a total of 386 or 421 respectively. No scholar now holds to more than 18 equestrian centuries. With this and a few other variations as to supernumerary centuries his view has been adopted by Savigny, *Vermischte Schriften*, i. 1 ff.; Mommsen, *Röm. Trib.*; Genz, *Centuriatcom. nach der Ref.*; Ihne, *Hist. of Rome*, iv. 15; Herzog, *Röm. Staatsverf.* i. 324; Klebs, in *Zeitschr. d. Savignyst.* xii (1892). 181-244; Schiller, *Röm. Alt.* 633; Kübler, in Pauly-Wissowa, *Real-Encycl.* iii. 1956 ff.; Greenidge, *Röm. Publ. Life*, 253; Le Tellier, *Organ. cent.* 89 ff.; Göttling, *Gesch. der röm. Staatsverf.* 383; Peter, *Epoch. d. Verfassungsgesch.* 75; Morlot, *Comices élect.* 85 ff.

³ *CIL.* vi. 196-8, 1104, 10097, 10214-8; *Inscr. bull. della comm. di Roma*, 1885. 161; *Notizie degli Scavi*, 1887. 191.

⁴ There must have been in the reformed *comitia* two curators from each class for every tribe. This connection with the classes was wrongly transferred to the tribunes of the plebs by Livy iii. 30. 7; Ascon. 76.

corpus as it must have stood in the period immediately following the reform. This result confirms the view suggested by Pantagathus.

It was accepted by Mommsen in his *Römische Tribus* (1844) and in the first seven editions of his *History of Rome*; but in his *Römisches Staatsrecht*¹ he has offered a radical modification: while holding to the 373 centuries, he maintains that they were so combined as to cast in all 193 votes. According to this theory the first class comprised $35 \times 2 = 70$ centuries, each with one vote, whereas the remaining classes together, made up of $4 \times 35 \times 2 = 280$ centuries, cast but 100 votes. How the centuries were combined Mommsen does not presume to say. He considers it possible, however, that for instance sixty of the seventy centuries of the second class were grouped by threes and ten by twos, making twenty-five voting groups in all. Had he attempted to follow out in detail the practical working of the theory, he would hardly have offered it to the public. The votes could not have been determined by a majority of component centuries, for according to the theory some groups comprised but two. Or if the group voted by individuals without regard to the component centuries, the four lower classes were practically composed not of centuries but of larger, nameless voting divisions.

His main support is the account of the centuriate organization given in Cicero's *Republic*,² which speaks of a hundred and ninety-three centuries, and which Mommsen³ believes to be a description of the reformed organization. Cicero's⁴ assumption that the essential facts were known to the friends of the younger Scipio—the leader in the dialogue—and the discrepancy in the number of centuries of the first class between the Servian system as given by the annalists (Livy and Dionysius) and the organization which Cicero describes⁵ are the chief points in Mommsen's favor. Against his interpretation it may be urged

¹ III. 274 ff.; cf. his *History of Rome* (Eng. ed. 1900), iii. 52 f. ² II. 22.

³ *Röm. Staatsr.* iii. 274 with notes; cf. Guiraud, in *Rev. hist.* xvii (1881). 16.

⁴ *Rep.* ii. 22. 39: "Quae discriptio, si esset ignota vobis, explicaretur a me; nunc rationem videtis esse talem."

⁵ Seventy in Cicero's description, eighty according to the annalists; p. 67 f., 205, n. 5.

(1) that the passage is exceedingly uncertain;¹ (2) that Cicero makes Servius Tullius the author of the organization which he describes; (3) that though the reform affected the details of the comitial organization, the principle — a distribution of the people according to ordines, census, aetates — remained the same from the time of Servius to the time of Cicero, so that he could assume that it was known to the hearers of Scipio; (4) that as to the discrepancy in the number of centuries in the first class, on the assumption that the text is correct, (*a*) Cicero, who was by no means infallible, may have made a mistake,² being in this case especially liable to error because in the reformed organization the first class comprised seventy centuries, or (*b*) in case Cicero is right, either (*m*) the annalists may be in error in assigning eighty centuries to the first class, or (*n*) in an early stage of transition from the old to the new organization the number of centuries in the first class may have been cut down to seventy with a corresponding increase of ten in some other part of the system; (5) that Mommsen's theory is refuted by the language of Cicero,³ who speaks of the voting divisions of the four lower classes not as groups of centuries but simply as centuries, the absence of a name for such a group being one of the strongest arguments against its existence. Mommsen's interpretation of the passage is in brief too strained and unnatural to commend itself to the understanding. Apart from its lack of support in the sources, an objection to the theory is

¹ It is unnecessary here to enter into the controversy regarding the text. Evidently the second hand has drawn from a reliable source (Klebs, *ibid.* 200-210); yet in view of its uncertainty the passage should not be made the foundation of a theory so thoroughly objectionable as Mommsen's.

² To Soltau, *Jahrb. f. cl. Philol.* xli (1895). 411, n. 3, this explanation seems "too cheap."

³ In the clause "Ut equitum centuriae cum sex suffragiis et prima classis addita centuria, quae . . . data, LXXXVIII centuriae habeat," centuriae applies to the centuries proper, but in the clause immediately following, "Quibus ex centum quatuor centuriis (tot enim reliquae sunt) octo solae accesserunt," the word on Mommsen's supposition must denote not the centuries themselves but the voting groups of centuries. Though Mommsen usually avoids the application of the term century to the assumed voting units, he allows himself to do so on p. 274 and in n. 2. Granting that in this instance he has used the word correctly, we should have the first class composed of simple centuries and the others of centuries which were themselves composed of centuries — an evidently absurd result of his assumption.

its extreme impracticability. Holding that juniors and seniors could not have been brought together in the same voting divisions, and assuming that the combinations were made by twos and threes and that the four lower classes had an equal number of votes, Klebs has worked out the simplest arrangement as follows :

CLASS	CENTURIES		VOTES
I	70	One vote each	70
II	70	35 of seniors	
		8 in groups of two . . . 4 votes	
		27 in groups of three . . 9 votes	
		<u>13 votes</u>	
		35 of juniors	
		2 in a group 1 vote	
		33 in groups of three . . 11 votes	
		<u>12 votes</u>	
		Total	25
If the remaining classes are like the second, we shall have :			
III	70		25
IV	70		25
V	70		25
Equites	18	One vote each	18
Supernumeraries	5	One vote each	5
		Total	<u>193¹</u>

This complex system would make the action of the centuriate assembly exceedingly slow and difficult, and would be as useless as impracticable; for if the object was to reduce the votes of the first class by ten and to make the other classes equal, that end could have been easily attained by the readjustment of numbers on the old basis, without the invention of this awkward grouping, the like of which is not known to have existed in any ancient or modern state. Such a reform, too, would bring out

¹ Klebs, in *Zeitschr. d. Savignyst.* xii (1892). 197. Not less complicated is Le Tellier's supposition (*Organ. cent.* 88, n. 1) that the four classes may have differed in number of votes (for example, 30, 28, 28, 14), and that the several voting groups of a class comprised the same number of centuries, in some cases with a fraction of a century, e.g., 2, 2½, 2½, 5 centuries for the four classes respectively. This combination would be as undemocratic and as impracticable as any of those proposed by Klebs.

more clearly than ever the inequality of rights in the comitia,¹ and therefore could not have been called democratic by Dionysius.² It is contradicted also by Livy,³ who distinctly states that the number of centuries was changed. Lastly the objection must be made that the joining of centuries of different tribes into voting units cannot be reconciled with the imperial grouping of centuries of the same tribe into corpora,⁴ and is refuted by the many citations which assume the voting or the announcement of the votes to have proceeded according to tribes⁵ as well as according to classes.⁶

Lange,⁷ not thinking it necessary to preserve a total of a hundred and ninety-three votes but accepting in the main the view of Pantagathus, tries to bring the centuries into relation with the tribes by assuming that the seventy half-tribes, severally comprising five centuries of juniors or seniors, were given each one vote in the "concluding announcement" (Schlussrenuntiation), this vote being determined by a majority of the five component centuries. In like manner the eighteen centuries of knights were grouped in divisions of three centuries each, so as to count six votes in the final announcement, hence the name sex suffragia. The supernumerary centuries were grouped in one or two voting divisions, so that in all seventy-seven or seventy-eight votes were cast.⁸ As to the process, he believed that after the prerogative the seventy centuries of the first class and the eighteen centuries of cavalry voted simultaneously, and while their votes were being counted the second class was voting, the votes, in his opinion, not being announced as soon as known.⁹ This view as to the announcement is contradicted by the sources,¹⁰ which clearly imply that

¹ Klebs, *ibid.* 187.

² P. 214, n. 6.

³ I. 43. 12.

⁴ P. 220.

⁵ P. 217.

⁶ P. 216, n. 3. Soltau's modifications, *Jahrb. f. Philol.* xli (1895). 410-4, of Mommsen's hypothesis are no improvement on the original.

⁷ *Röm. Alt.* ii. 510 ff.

⁸ In this way the prerogative century, after serving as an omen (Cic. *Mur.* 18. 39), would be joined with four others of the same half-tribe.

⁹ Lange, *Röm. Alt.* ii. 526.

¹⁰ Livy xliii. 16. 14 (171 B.C.): "Cum ex duodecim centuriis equitum octo censorem condemnassent multaeque aliae primae classis, extemplo principes civitatis . . . vestem mutarunt." This proves that the votes were made public early in

the reports were made public as they came in. Against his theory may be urged also (1) the fact that no name existed for the half-tribe, which in his opinion cast one vote in the closing announcement,¹ as well as (2) the fact that the sources give more than six votes to the equites in the late republic.² Lange is right, however, in understanding that the voting did not now, as formerly, cease when a majority was reached, but continued till all the centuries had voted.³

A solution of the problem as to the order of voting suggested by Klebs⁴ seems to satisfy all conditions. The centuries gave their votes by classes, each being announced as soon as it was ascertained. Then when all the centuries had voted, a count was taken by tribes in the order determined by lot;⁵ and a second announcement, made in that order, decided the election or other act of the people. Each candidate was declared elected when a majority of votes was reached in his favor.

the course of the voting, though not necessarily before the second class began; cf. Cic. *Phil.* ii. 33. 82. Lange too hastily rejects the evidence of these two passages. The vote of each century was announced separately; Varro, *L. L.* vii. 42: "Quod . . . comitiis cum recitatur a praecone dicitur olla centuria," which would not be true, if, as Lange supposes, the announcement was by tribal groups of five.

¹ Cf. Gerathewohl, *Reit. und Rittercent.* 90, n. 2.

² As authority for the six votes of the eighteen equestrian centuries Lange cites Cic. *Rep.* ii. 22. 39: "Equitum centuriae cum sex suffragiis"; *Phil.* ii. 33. 82; "Prima classis vocatur, renuntiatur; deinde, ita ut adsolet, suffragia." So far as these two passages are concerned, Lange could be right; but his view is contradicted by Festus 334. 29 ("Sex suffragia appellantur in equitum centuriis, quae sunt adiecta — MS. adfectae — ei numero centuriarum, quas Priscus Tarquinius rex constituit"), which distinguishes the sex suffragia from the remaining centuries of cavalry, and by Livy xliii. 16. 14, which gives each century a vote.

³ All the tribes voted; Livy vi. 21. 5 (a historical anticipation but useful for showing later custom); viii. 37. 12; xxix. 37. 13 f.; ep. xlix; Val. Max. ix. 10. 1. All the centuries voted; Livy xxiv. 9. 3; xxvi. 18. 9; 22. 13; xxvii. 21. 4; xxviii. 38. 6; xxix. 22. 5; xxxi. 6. 3; Cic. *Sull.* 32. 91; *Pis.* 1. 2; *Imp. Pomp.* 1. 2.

⁴ In *Zeitschr. d. Savignyst.* xii (1892). 230 ff.

⁵ Lucan v. 392 ff.:

"Fingit solemnia campi
Et non admissae diribet suffragia plebis
Decantatque tribus et vana versat in urna."

These verses picture a sham election held by Caesar in 49; he pretends to hold comitia, counts the votes of the plebs, who are not really permitted to be present, calls off the tribes, and draws lots for them from the empty urn.

Regarding the supernumerary centuries our information is extremely meagre. As it does not seem likely that influential corporations would be robbed of a privilege they once enjoyed, we may reasonably believe that the artisans, musicians, and accensi velati retained centuries of their own in the reformed organization. Cicero,¹ however, speaks of a single century of artisans for his time. The two industrial colleges, which had existed from an early age,² seem to have been joined in one and to have continued into the imperial period after nearly all the other guilds had been abolished.³ When the two were united, they were probably reduced to a single vote in the assembly. In like manner the liticines, or tubicines, and the cornicines were united in one college of musicians⁴ and were probably given one vote. The accensi velati, too, formed a college composed of wealthy freedmen, freeborn, and even knights.⁵ We may well suppose that it still possessed a vote in the centuriate assembly. Lastly may be mentioned the century of proletarians and that of the tardy,⁶ which were as necessary after the reform as before it.⁷ Although new centuries were added, possibly by the later republican censors and certainly by the emperors,⁸ the principle of the reformed organization remained unchanged.⁹

In the reformed assembly the equestrian centuries ceased to

¹ *Orat.* 46. 156: "Centuriam, ut Censoriae Tabulae loquuntur, fabrum audeo dicere, non fabrorum." Cicero seems to refer to recent Tabulae Censoriae; though he might quote ancient poets, he was not the man to ransack old documents even to learn the ancient usage of words.

² Plut. *Num.* 17; Pliny, *N. H.* xxxiv. 1. 1.

³ Ascon. 75: "Postea collegia S. C. et pluribus legibus sunt sublata praeter pauca atque certa, quae utilitas civitatis desiderasset, qualia sunt (MS. quasi, ut) fabrorum fictorumque."

⁴ P. 207, n. 1.

⁵ See citations in Olcott, *Thes. ling. lat. ep.* i. 51.

⁶ P. 208 f.

⁷ That these supernumerary centuries were abolished at the time of the reform is argued by Huschke, *Verf. des. Serv.* 622 f.; Plüss, *Centurienverf.* 28, 34; Genz, *Centuriatcom. nach der Ref.* 12; Klebs, in *Zeitschr. d. Savignyst.* xii. 218. That they continued in the new system is the belief of Mommsen, *Röm. Staatsr.* iii. 281 ff.; Lange, *Röm. Alt.* ii. 512; Le Tellier, *Organ. cent.* 90.

⁸ P. 220 f.

⁹ The supposed Sullan reaction to the earlier form of the centuriate comitia is not well founded; p. 406.

be prerogative.¹ A century was drawn from the first class² by lot³ to take the lead in voting. Then came the remainder of the class, including the equestrian centuries and the single century of artisans, eighty-eight in all. In the announcement the votes of the equites were distinguished from those of the class;⁴ and the sex suffragia, no longer exclusively patrician,⁵ were reported after the other eighty-two. The inferior place assigned to the suffragia was evidently to remove them far from their earlier prerogative position so as to free the assembly from patrician influence. Next the lower classes, among which other supernumerary centuries were distributed as in the earlier republic, voted in order; and finally came the summing up by tribes in the way described above. The old military array gave place to a civilian grouping like that already established for the curiate and tribal assemblies.⁶

I. THE EARLIER ORGANIZATION: the literature on this subject is essentially the same as for ch. iv.

II. THE REFORM: Schulze, C. F., *Volksversamml. der Römer*, 69 ff.; Huschke, Ph. E., *Verfass. des Königs Servius Tullius*, ch. xii; Peter, C., *Epochen der Verfassungsgesch. der röm. Republik*, 42 ff.; Savigny, F. C., *Verbindung der Centurien mit den Tribus*, in *Vermischte Schriften*, i. 1-13; for other early literature, see Lange, *Röm. Alt.* ii. 495 ff., notes; Neumann,

¹ P. 212.

² P. 217. This is a necessary inference from the term used to describe a prerogative centuria, e.g., *Aniensis iuniorum*. Had the drawing been from a group of classes, the number of the class would have been added, e.g., *Aniensis iuniorum secundae classis*.

³ Cic. *Phil.* ii. 33. 82.

⁴ Livy xliii. 16. 14: "Cum ex duodecim centuriis equitum octo censorem condemnassent multaeque aliae primae classis" (171 B.C.). This passage proves that the announcement distinguished the votes of the twelve equestrian centuries both from the sex suffragia and from those of the class. Cic. *Phil.* ii. 33. 82: "Sortitio praerogativae; quiescit. Renuntiatur; tacet. Prima classis vocatur, renuntiatur; deinde, ita ut adsolet, suffragia; tum secunda classis vocatur." Here Cicero informs us that the (sex) suffragia were announced after the report of the first class had been given. The circumstance that he does not mention the separate calling of the suffragia indicates that their separation from the first class was limited to the announcement. There is no reason why the Romans should have added to the length of the centuriate sessions by assigning a part of the day to the exclusive use of these six centuries. Livy, i. 43. 8 f., has their inferiority in mind. It is unnecessary to amend the Ciceronian passage. The attempt of Holzapfel, in *Beiträge zur alten Gesch.* i (1902). 254 f., is unsuccessful. Klebs, in *Zeitschr. d. Savignyst.* xii (1892). 237 ff., fruitlessly opposes the division of the equites into these two groups.

⁵ P. 74 f., 95 f., 209 f.

⁶ P. 211, 467, 469.

C., *Zeitalter der punischen Kriege*, 187 ff.; Nitzsch, K. W., *Gesch. der röm. Republik*, i. 146 f.; Mommsen, *Röm. Tribus*, 66–113, 143–149; *Röm. Staatsr.* iii. 269 ff.; Lange, L., *De magistratuum romanorum renuntiatione et de centuriatorum comitiorum forma recentiore*, in *Kleine Schriften*, ii. 463–493; *Röm. Alt.* ii. 494–516; Madvig, J. N., *Verfass. und Verw. des röm. Staates*, i. 117–23; Herzog, E., *Röm. Staatsverf.* i. 320–7; *Die Charakter der Tributcomitien . . . und die Reform der Centuriatcomitien*, in *Philol.* xxiv (1876). 312–29; Willems, P., *Droit public Romain*, 92–8; Mispoulet, J. B., *Institutions politiques des Romains*, i. 46–8; Greenidge, A. H. J., *Roman Public Life*, 252 f.; Abbott, F. F., *Roman Political Institutions*, 74–6; Karlowa, O., *Röm. Rechtsgesch.* i. 384–8; Soltau, W., *Altröm. Volksversamml.* 358–71; *Cicero de Re Publica und die servianische Centurienordnung*, in *Jahrb. f. Philol.* xli (1895). 410–4; Kappeyne Van de Coppello, J., *Comitien*, 20 ff.; Morlot, E., *Comices électoraux sous la république Rom.* ch. v; Goguet, R., *Centuries*, ch. iv; Le Tellier, M., *L'organisation centuriate*, ch. ii; Hallays, A., *Comices à Rome*, 25–31; Plüss, H. T., *Entwick. der Centurienverfass.*; Ullrich, J., *Centuriatcomitien*; Clason, O., *Zur Frage über die reformierte Centurienverfass.* in *Heidelb. Jahrb.* lxx (1872). 221–37; Ritschl, F. W., *Opuscula Philologica*, iii. 637–73; Genz, H., *Centuriat-Comitien nach der Reform*; Guiraud, P., *De la Reforme des Comices centuriates au III^e Siècle av. J.-C.* in *Rev. hist.* xvii (1881). 1–24; Klebs, E., *Stimmenszahl und Abstimmungsordnung der ref. servianischen Verf.*, in *Zeitschr. d. Savigny-stift. f. Rechtsgesch. Röm. Abt.* xii (1892). 181–244; Meyer, E., *Die angebliche Centurienreform Sullas*, in *Hermes*, xxxiii (1898). 652–4; Humbert, G., in Daremberg et Saglio, *Dict.* ii. 1389 f.; Kübler, in Pauly-Wissowa, *Real-Encycl.* iii. 1956–60.

CHAPTER XI

THE FUNCTIONS OF THE COMITIA CENTURIATA

I. *Elective*

THE first act of the centuriate assembly according to Livy,¹ who has certainly placed the beginning of its functions at the earliest possible date,² was the election of the first two consuls. Thereafter these comitia not only continued to elect the consuls, but also naturally acquired the right to choose all elective higher magistrates, extraordinary as well as ordinary, who were entrusted temporarily or permanently with some or all of the consular power—including the decemviri legibus scribundis, 451, 450, the tribuni militum consulari potestate, beginning in 444, the two censors, beginning in 443 (or 435?), and the praetors, increased gradually from one in 366 to sixteen under Caesar.³ The activity of this assembly in elections expanded with the growth in the number of offices; and its importance was further enhanced by the opening of the patrician magistracies to plebeians. The validity of a centuriate elective act depended upon the subsequent curiate law, which soon became a mere form, and upon the patrum auctoritas. The latter, too,

¹ P. 201, n. 2.

² The idea that Servius Tullius gave this assembly the right to elect kings (Dion. Hal. v. 12. 3; Lange, *Röm. Alt.* i. 458; ii. 531) is proved wrong by the circumstance that the organization attributed to him was purely military, from which the comitia centuriata slowly developed; p. 203 ff.

³ Lange, *Röm. Alt.* ii. 531. On the number of praetors, see Mommsen, *Röm. Staatsr.* ii. 202. The election of a centurion to the function of dedicating a temple (Livy ii. 27. 6) in the period before the first secession Lange (ibid. i. 917; ii. 532) with good reason considers a myth. It is doubtful, however, whether he is right in viewing as historical the so-called *lex Valeria de candidatis*, assigned to the first year of the republic (Plut. *Popl.* 11; Lange, ibid. ii. 532), which ordered the presiding magistrate to accept as candidates all qualified patricians who offered themselves for the consulship—a principle said to have been afterward applied to other patrician offices.

was deprived of all vitality by the Maenian plebiscite,¹ which required the act to be passed before the election while the issue was uncertain.² The date of this plebiscite is unknown; but it probably followed close upon the Hortensian legislation (287).³

II. *Legislative*

In an earlier chapter⁴ it was shown that primitive Rome, like primitive Greece, regarded law as god-given—a conception which left no scope for legislation by a popular assembly. Though under the kings the people may occasionally have been called to vote on a resolution affecting their customs, the comitia curiata never acquired a law-making function.⁵ Even the declaration of war, which historical Rome looked upon as a *lex*, was issued by the king without the consent of the community, his only need being to secure the hearty support of the warriors.⁶ It seems probable therefore that this question came, not before the comitia, but before a military *contio*.⁷ From the custom of the soldiers to participate in the settlement of questions touching their interests⁸ developed the function of declaring war. The people, however, were slow in acquiring the right. It is true that several such acts are mentioned by Dionysius for the early republic—for the war against the Volscians, 489,⁹ against Veii, 482,¹⁰ and against the Aequians and Volscians in 462.¹¹ These instances may be explained either as acclamations in *contio* or as exceptional votes in the comitia centuriata, or with more probability, owing to the character of our sources for those early times, as anticipations of later usage. The decisive fact in the problem is that as late as 427 a controversy arose as to whether war could be declared by order of the people only, or whether a *senatus consultum* was sufficient. It was settled in favor of the people by the threats of the plebeian tribunes to impede the levy.¹² For the next hundred years mention is often

¹ P. 331.

² Cic. *Brut.* 14. 55; cf. Lange, *Röm. Alt.* i. 409; ii. 115, 532.

³ On the centuriate elective function in general, see Lange, *ibid.* ii. 531–3. Willems, *Sén. Rom.* ii. 69 ff., contends unconvincingly that the Maenian statute should be assigned to 338.

⁴ P. 177.

⁵ P. 181 f.

⁶ P. 177.

⁷ P. 177.

⁸ P. 202 f.; cf. Lange, *Röm. Alt.* ii. 599 f.

⁹ Dion. Hal. viii. 15. 3.

¹⁰ VIII. 91. 4.

¹¹ IX. 69. 2.

¹² Livy iv. 30. 15.

made of the exercise of this function by the people;¹ and when a declaration was once issued by them, it could be recalled only by their vote.² During the period of the Samnite wars the assembly still more frequently made use of this right.³ In better known times we find it firmly established. The people declared war against Carthage in 264,⁴ against the Illyrians in 229,⁵ against Carthage again in 218,⁶ against Macedon in 200,⁷ against Antiochus in 191,⁸ against Macedon again in 171,⁹ against Jugurtha in 111.¹⁰ In the case of the two Macedonian wars here referred to, the declaration is mentioned as an act of the *comitia centuriata*.¹¹ In 167 the praetor M'. Juventus Thalna attempted to pass through the tribal assembly a *lex de bello indicendo* against the Rhodians, but was effectually opposed by a tribune of the plebs;¹² so that the function continued to be exclusively centuriate. Cn. Manlius Volso in 189 made war upon the Gallograeci without an order of the people or a decree of the senate, and was on that ground accused in the senate by two of his legati.¹³ We conclude, however, that the charge was fruitless from the circumstance that the senate finally decreed him a triumph.¹⁴ For beginning war against the Histrians on his own responsibility the consul A. Manlius, 178, was threatened with a prosecution, which was quashed by a tribunician veto.¹⁵ Licinius Lucullus was not even brought to trial for the war he waged without an order of the people against the Vaccaei in 151.¹⁶ Hence it appears that though a magistrate could not legally begin war on his own initiative, there was no real

¹ Livy iv. 58. 8, 14; 60. 9 (406); vi. 21. 3 (383) 22. 4 (382); vii. 6. 7 (362); 12. 6 (358); 19. 10 (353); 32. 1 (343).

² Livy vii. 20. 3.

³ Livy viii. 22. 8 (327); 25. 2 with Dion. Hal. xv. 14 (326); Livy viii. 29. 6 (325); ix. 43. 2 (306); 45. 8 (304); x. 12. 3 (298); 45. 6 f. (293).

⁴ Polyb. i. 11.

⁵ Dio Cass. Frag. 49. 5; Zon. viii. 19. 4.

⁶ Livy xxi. 17. 4.

⁷ Livy xxxi. 5-8; especially 6. 1, 3; 7. 1.

⁸ Livy xxxvi. 1. 4 f.; 2. 2 f.

⁹ Livy xlii. 30. 10 f.; 36. 2.

¹⁰ Oros. v. 15. 1: "*Consensu populi*."

¹¹ Livy xxxi. 6. 3; 7. 1; xlii. 30. 10; cf. 36. 1.

¹² Livy xlv. 21; Polyb. xxx. 4. 4 ff.

¹³ Livy xxxviii. 42. 11; 45. 4 ff.

¹⁴ Livy xxxviii. 50. 3.

¹⁵ Livy xli. 6; 7. 8; cf. Mommsen, *Röm. Staatsr.* ii. 320, n. 3.

¹⁶ Appian, *Iber.* 51, 55. The condemnation of M. Aemilius Lepidus, proconsul in 136, to a fine by a judgment of the people seems to have been more for the failure of his war upon the same state than for beginning it without authorization; Appian, *Iber.* 80-82; Livy, ep. lvi; Oros. v. 5. 14.

danger of condemnation for so doing. The reason is that those in authority attached little importance to the right of the comitia in the matter. Only once is mentioned a fear lest the people may not give their consent to a war.¹ One case of rejection is recorded, and even here the centuries at a second session obediently accepted the consul's proposition.² The control of diplomacy and of the revenues by the senate and magistrates assured these powers the practical decision of questions of war and peace to such an extent that ratification by the assembly could ordinarily be counted on as certain; and its influence decreased with the expansion of the empire. Meantime, however, the idea of popular sovereignty, which was expressing itself in other spheres of government, effectually demanded, if only in form, some concession to the assembly in this field as well; and accordingly in the formula of declaration "populus" wholly takes the place of the once all-important "senatus."³ By such empty concessions the nobility rendered the people more docile. Thus to the end of the republic the centuriate assembly retained the constitutional right to decide questions of aggressive war, although in practice the magistrates nearly regained the place which they and the senate had held during the century following the overthrow of kingship.⁴

The nature of our sources does not allow a precise judgment regarding the importance of the comitia curiata in the early republic. To the time of the Gallic invasion it may occasionally have passed resolutions affecting the status of citizens.⁵ But as legislation never became an acknowledged function of the curiae, we are in a position to assert that through the comitia centuriata the people were first introduced into this sphere of public life.⁶

The earliest legislation of this assembly, in fact the earliest recorded legislative act of the Roman people, was the *lex de provocatione* attributed to Valerius Publicola, consul in the first

¹ Livy iv. 58. 14.

² This is the Macedonian war beginning in 200; p. 231; cf. Lange, *Röm. Alt. ii.* 602.

³ P. 176; Gell. xvi. 4. 1; Livy xxxvi. 2. 2.

⁴ Dio Cass. xxxviii. 41. 1 ff.; Cic. *Pis.* 21. 48 f.

⁵ E.g., the act which recalled Camillus from exile; Livy v. 46. 10; xxii. 14. 11; Cic. *Dom.* 32. 86.

⁶ P. 181 f.

year of the republic, 509.¹ It was also through the *centuriate* assembly that the consuls Valerius and Horatius in 449 passed a law which forbade the election of a magistrate without appeal, and affixed as a penalty the outlawing of the trespasser.² The third Valerian law of appeal in 300³ was an act of the same assembly, whereas all three Porcian laws on the same subject seem to have been tribal.⁴ The legislative function of the centuriate assembly, resting in the pre-decemviral period simply on precedent, brought into being the statute of 471 to establish a tribal assembly for the transaction of plebeian business, improperly known as the Publilian law,⁵ the *lex sacrata* for the division of the Aventine among the plebeians, erroneously termed Icilian, 456,⁶ the *lex Aternia Tarpeia de multae dictione*, 454,⁷ the *lex Menenia Sextia* on the same subjects in 452,⁸ the laws ratifying the Twelve Tables in 451, 449⁹ — all excepting the second having reference to the limitation of the magisterial power. Regarding the creation of offices, no mention is made of a law for the institution of the consulate itself; but the centuries passed a law for the creation of the dictatorship, 501,¹⁰ and of the *decemviri legibus scribundis*, which should be named Sestian after the consul who undoubtedly proposed it, 452.¹¹ Thus far popular legislation had no basis excepting precedent, but a law of the Twelve Tables now provided that there should be resolu-

¹ P. 201, 240.

² Livy iii. 55. 4; Cic. *Rep.* ii. 31. 54.

³ Livy x. 9. 5; cf. p. 242 below.

⁴ P. 250 f. 349.

⁵ P. 270 f.

⁶ P. 272.

⁷ P. 269.

⁸ Fest. 237. 17; Lange, *Röm. Alt.* i. 622; ii. 603. The contents are unknown.

⁹ Livy iii. 34. 6. Doubt has been thrown on the early date of the Twelve Tables by Pais, *Storia di Roma*, I. i. 558–606, and on their official character as well by Lambert, *La question de l'authenticité des XII Tables et les annales maximí; L'histoire traditionnelle des XII Tables et les critères d'inauthenticité des traditions en usage dans l'école de Mommsen in Mélanges Ch. Appleton*, 503–626; *La fonction du droit civil comparé*, 390–718; *Le problème de l'origine des XII Tables*, in *Revue générale de droit*, 1902. 385 ff., 481 ff. Their views are controverted by Greenidge, in *Eng. Hist. Rev.* xx (1905). 1–21. For other literature on the subject, see *Jahresb. u. Altwiss.* cxxxiv (1907). 17 ff.

According to Diod. xii. 26. 1, the last two tables were drawn up by Valerius and Horatius, consuls in 449.

¹⁰ Livy ii. 18. 5; Dion. Hal. v. 70. 5; Lange, *Röm. Alt.* i. 585; ii. 603. Dion. Hal. vi. 90. 2, assumes the enactment of a statute for the creation of the plebeian tribunate, 494.

¹¹ Livy iii. 33. 4; Dion. Hal. x. 55. 3 (cf. p. 273).

tions and votes of the people, and¹ whatever the people voted last should be law and valid — the first clear enunciation of the principle that the will of the people, whenever expressed, prevailed over every other authority.¹ It was far from establishing popular sovereignty, however, for the initiative remained with the magistrates.

The activity of the comitia centuriata, thus authoritatively established, manifested itself in the passing of the Valerian-Horatian laws of 449,² the lex Iulia Papiria de multarum aestimatione, 430,³ the law for the election of six military tribunes by the comitia tributa, 362,⁴ the law of the dictator Publilius Philo, 339,⁵ the third Valerian law concerning appeal, 300,⁶ and finally the Hortensian law, 287.⁷ All have reference to the regulation of magistracies or of assemblies. Meantime the centuriate comitia passed the law for instituting tribunes of the soldiers with consular power, 445,⁸ and censors, 443⁹ (or 435²), for increasing the number of quaestors, 421,¹⁰ for instituting the praetorship, 367,¹¹ and the curule aedileship in the same year.¹² All the laws thus far mentioned, excepting that for the division of the Aventine, effected important modifications of the constitution, the most of them forced upon the senate and magistrates in the struggle for equal rights in which the commons were engaged with the nobility. In like manner two provisions of the Valerian law of 342, (1) that the name of no soldier should be erased

¹ Livy vii. 17. 12: "In Duodecim Tabulis legem esse, ut, quodcumque postremum populus iussisset, id ius ratumque esset; iussum populi et suffragia esse." After the decemviral legislation an attempt was made to extend the principle to elections, as in the case here mentioned by Livy. ² P. 274 ff. ³ P. 287.

⁴ Livy vii. 5. 9; Sall. *Jug.* 63; Cic. *Cluent.* 54. 148; *Leg.* iii. 3. 6; Lange, *Röm. All.* ii. 25, 604. It is only an inference that this important constitutional change was brought about by the centuries rather than by the tribes.

⁵ P. 299 f.

⁶ P. 233, 241 f.

⁷ P. 313.

⁸ Livy iv. 6. 8. A law is not mentioned but must be inferred; Lange, *Röm. All.* i. 650; ii. 603.

⁹ Livy ix. 34. 7: "Illi antiquae (legi), qua primum censores creati sunt"; cf. Lange, *ibid.* i. 664. In 433 a law, doubtless centuriate, of the dictator Mam. Aemilius cut down the term of the censors to eighteen months; Livy iv. 24. 5 f.; ix. 33. 6; ch. 34.

¹⁰ Livy iv. 43; Tac. *Ann.* xi. 22; cf. Lange, *ibid.* i. 666.

¹¹ Livy vi. 42. 11.

¹² *Ibid.* § 13. The laws last named, relating to the quaestorship, praetorship, and aedileship, are not mentioned by the ancient authorities but are necessarily assumed; Lange, *Röm. All.* i. 476, 479.

from the muster roll without his consent, (2) that no military tribune should be degraded to the rank of centurion,¹ established under the sanction of an oath certain fundamental rights on which the soldiers and their officers respectively insisted. Another provision, the total abolition of debts,² if indeed it is historical, was administrative, and is considered therefore in another connection.³ Of the same nature, though less sweeping, was the Hortensian provision for the relief of debtors.

As soon as there came to be plebeian senators (about 400), the patricians reserved to themselves the right to decide on the legality of legislative and elective acts of the people under patrician presidency — a right designated by the phrase *patrum auctoritas*, which signified originally the authorization of the senators, thereafter of the patrician senators. Till 339 the *patres* were at liberty to give or withhold the *auctoritas*; but in that year an article of the Publilian law required them to grant it to legislative acts of the centuries before the voting began and while the issue was still in doubt, reducing it in this way to a mere formality.⁴ The effect was to free centuriate legislation from the constitutional control hitherto exercised by patrician senators.⁵ Henceforth the resolutions of this assembly could be declared illegal by no less than a majority of the entire senate. The Publilian statute, accordingly, deprived the patricians of an important power, whereas the senate as a whole continued through its *consulta* to exercise an increasing influence over the *comitia centuriata*. Polybius rightly ascribes to the consuls, therefore, the function of bringing the resolutions of the senate before the assembly. It could not have been the intention of Publilius Philo to energize the *comitia centuriata*

¹ Livy vii. 41. 4.

² Appian, *Samn.* i. 3; cf. p. 298.

³ P. 238.

⁴ Livy viii. 12. 15; cf. i. 17. 9. The *auctoritas* applied to *comitia curiata* as well as *centuriata*; Cic. *Dom.* 14. 38; Livy vi. 41. 10. On the *comitia tributa*, see p. 314.

⁵ The view maintained by Willems, *Sén. Rom.* ii. 33 ff., that the *patres auctores* were all the senators, not merely the patrician members, is disproved by Cic. *Dom.* 14. 38 (Should the patriciate become extinct, there would no longer be "*auctores centuriatorum et curiatorum comitiorum*"). In spite of some looseness of statement in the passage cited, there seems to be no good ground for considering either the whole oration spurious or the particular reference to the *auctoritas* inaccurate. The question, too complex for detailed treatment in this volume, is of practical importance for the period only from about 400 to 339.

by this provision; for another article of the same statute, confirming the validity of the tribunician assembly of tribes, as then actually constituted exclusively of plebeians, paved the way for the Hortensian law, which by making the acts of the tribunician assembly in every respect equal to those of the centuries, deprived the latter of their great importance as a factor in constitutional progress. From the time of Hortensius to the time of Sulla no constitutional statute is known to have been enacted by the centuriate assembly; though our sources do not give us clear information on the point, it is highly probable that the consuls and dictators of this period preferred to bring their measures however important before the tribes.¹ In Sulla's time the *lex Valeria*, 82,² clothing him with his extraordinary dictatorship *rei publicae constituendae*, must have been passed by the centuries, which alone in addition to the politically obsolete *comitia curiata* could be summoned by an *interrex*, as was the author of the law. This act, Lange remarks, cannot well be considered a revival of the legislative power of the centuries, as it was not only passed through intimidation and under a magistrate who had no constitutional right to initiate legislation, but it also created a legalized tyranny destructive of popular freedom.³ In the words of Cicero it was the most iniquitous of all laws and most unlike a law.⁴ Only one of Sulla's statutes, the *lex de civitate Volaterranis adimenda*, 81, which, depriving the Volaterrani of their *civitas cum suffragio*, placed them in the condition of the Latins of Ariminum, is known to have been an act of the centuries.⁵ Probably all his other laws were ratified by the tribes.⁶ C. Julius Caesar preferably used the tribes, although it is possible that his *lex de provinciis* and his *lex iudiciaria* came before the *comitia centuriata*.⁷

Sulla's constitutional legislation curtailed the powers of the plebeian tribunes and of their assembly, proportionally increas-

¹ Lange, *Röm. Alt.* ii. 605 f.

² P. 412.

³ Lange, *Röm. Alt.* i. 553; ii. 606.

⁴ *Leg. Agr.* iii. 2. 5; cf. *Leg.* i. 15. 42; *Rosc. Am.* 43. 125; *Schol. Gron.* 435; *Appian, B. C.* i. 98. 458 ff.; *Plut. Sull.* 33.

⁵ *Cic. Dom.* 30. 79; *Caecin.* 33. 95; 35. 102.

⁶ P. 416, n. 1.

⁷ *Cic. Phil.* i. 8. 19 obscurely suggests that these two laws were centuriate, though Lange, *Röm. Alt.* ii. 606, doubts it; cf. p. 455.

ing the importance of the centuries; and although his form of government was of short duration, the optimates thereafter naturally preferred the *comitia centuriata* for the ratification of senatorial resolutions.¹ To this assembly accordingly belong the *leges Vibiae* of the consul C. Vibius Pansa, 43, which confirmed the acts of Caesar, and took the place of Antony's *leges de coloniis deducendis* and of his *lex de dictatura tollenda*.²

On the institution of the censorship, and by the law which called the office into being, it was enacted that elections of censors should be ratified, not by the *curiae* as in the case of other magistrates, but by the centuries themselves.³ Before this date the principle was already established that the people should vote twice in the election of every magistrate in order that if they repented of their choice, they might recall it by a second vote.⁴ As the primary function of the censors was the periodical reconstitution of the *comitia centuriata*, it was doubtless thought appropriate that this assembly alone should be concerned with the election. The *lex centuriata de potestate censoria*, evidently passed under consular presidency, remained, like the *curiate* law in confirmation of elections to other offices, a mere form. It was of too little practical significance ever to be noticed by the historians; in fact no individual instance of the passing of this act is mentioned by any extant writer. Characteristically the *lex Aemilia*, 433, which is alleged to have cut down the term of censorship to eighteen months,⁵ and the *lex Publilia Philonis*, 339, which provided that at least one censor must be a plebeian,⁶ were centuriate, whereas the Licinian-Sextian law, 367, which provided that one consul must be a

¹ Cf. Appian, *B. C.* iii. 30. 117.

² Cic. *Phil.* x. 8. 17; xiii. 15. 31; cf. v. 19. 53.

³ Cic. *Leg. Agr.* ii. 11. 26: "Centuriata lex censoribus ferebatur."

⁴ P. 185. Before the institution of the censorship the original motive of the sanctioning act — to leave the *curiae* a share in the elective function — must have given way to the purpose stated by Cicero and represented here in the text.

⁵ Livy iv. 24. 3 ff.; cf. ix. 33 f.

⁶ Livy viii. 12. 16; cf. p. 300. Livy's words referring to the censorship are corrupt, but the passage seems to have the meaning here given; cf. Mommsen, *Röm. Staatsr.* ii. 340, n. 2. It was not till 131 that advantage was taken of the provision; Livy, ep. lix. Herzog, *Röm. Staatsverf.* i. 257, refuses to believe that both censors might now be plebeian.

plebeian,¹ and the Genucian law, 342, permitting both to be,² were plebiscites.

An occasional attempt was made by a magistrate to usurp for the comitia centuriata a share in the administration. The first which is worthy of notice,³ even though it may be mythical, is the agrarian proposal of Sp. Cassius, 486. According to the sources it was opposed by the senate and the colleague of the mover. Far from enacting it into a law, the author, on the expiration of his consulship, was himself accused of attempting to usurp the royal power, and was, in one version of the story, condemned to death by the assembly to which he had offered the bill.⁴ The senate must have taken very seriously this first attempt of a magistrate to transfer some of its administrative power to the comitia. The law for the division of the Aventine Hill among the people, 456, was actually passed, most probably by the centuries.⁵ It was forced upon the government by the plebeians, and did not serve as a precedent for the future. The Valerian law of 342,⁶ which abolished debts, was an extraordinary administrative measure similar in character, but far more sweeping, to the clause for the relief of debtors in the Licinian-Sextian plebiscite.

If then the centuriate assembly was excluded from the field of administration, it must certainly in pre-decemviral times have had no part in religious legislation. The law which regulated the intercalary month inscribed on a bronze column by Pinarius and Furius, consuls in 472,⁷ and the ancient law composed in archaic letters, mentioned in connection with the year 363,⁸ requiring the praetor maximus to drive the nail on the ides of September, must accordingly have been acts, not of the centuriate assembly.

¹ Livy vi. 35. 5. The provision that "at least" one should be plebeian is doubtless an anticipation of the Genucian law. ² Livy vii. 42. 2; cf. p. 299.

³ The alleged centuriate resolution granting a place for a dwelling to P. Valerius Publicola, passed under his own presidency (Ascon. 13), is still earlier and less trustworthy. ⁴ Livy ii. 41; Dion Hal. viii. 71, 73 ff.

⁵ Livy iii. 31. 1. In 32. 7 he calls it the Icilian law with the idea that it was tribunician; but Dion Hal. x. 32. 4, referring to the document kept in the temple of Diana, states that it was passed by the centuriate assembly; cf. Herzog, *Röm. Staatsverf.* i. 169, n. 1. Lange, *Röm. Alt.* i. 619; ii. 607 f., wrongly asserts that it was a plebiscite; cf. p. 272 below.

⁶ P. 234 f., 298.

⁷ Macrob. *Sat.* i. 13. 21.

⁸ Livy vii. 3. 5.

riate assembly, but of the pontifical college. By the ratification of the Twelve Tables, composed chiefly of private laws and of closely connected religious regulations, an example was set for the invasion of both of these legal spheres by the centuriate assembly. But the precedent remained unproductive; for at this time the tribal assembly under plebeian or patrician magistrates was recognized as competent for legislation, and naturally took to itself the function of enacting the less weighty, for a time generally the non-constitutional, laws.¹ We are not to imagine the field of legislation clearly divided into constitutional, private, religious, and other departments; aside from the question of declaring an offensive war, which remained strictly the province of the *comitia centuriata*, the distinction in legislation was simply between the more and the less important; the dignified assembly of centuries, organized on an aristocratic-timocratic basis, was entrusted with the weightier business, whereas the simpler tribal assembly, which was easier to summon and more expeditious in action, served well enough for the despatch of lighter business. The question of the assembly to be employed was largely one of inertia; it required a far greater force of circumstances to set in motion for legislative purposes the cumbrous centuriate assembly than the relatively mobile gathering of the tribes.

III. *Judicial*

The jurisdiction of the people in whatever assembly was confined to cases of crime and of serious disobedience to magistrates.² It was not exercised by them in the first instance but only by way of appeal. In the opinion of the Romans Tullus Hostilius was the first to grant an appeal,³ necessarily to the *comitia curiata*, which under the kings remained the only formally voting assembly.⁴ During the regal period, the well attested

¹ Lange, *Röm. Alt.* ii. 608 f.

² Lange, *Röm. Alt.* ii. 541, and note on earlier literature; Mommsen, *Röm. Staatsr.* i. 148 f., 160 f.; iii. 353.

³ Livy i. 26. 5-14; viii. 33. 8. For the theory that the popular assembly was sometimes a court of the first instance, see p. 260.

⁴ Lange's idea (*ibid.* i. 457 f.; ii. 542) that Servius Tullius transferred appellate jurisdiction to the *comitia centuriata* rests upon his view that Servius was the author of the political centuriate organization.

appellate function of the comitia¹ was simply precarious, depending wholly on the pleasure of the king.² The Romans represented the advance in liberty brought by the republic as consisting partly in the establishment of the right of appeal for every citizen through the *læx de provocatione* of Valerius,³ a consul of the first year of the republic—according to Cicero the first law carried through the comitia centuriata—providing that no magistrate should scourge or put to death a citizen without granting him an appeal to the people.⁴ Although the historical existence of this Valerius has been questioned, and though his law has the appearance of being an anticipation of the Valerian law of 449, or more closely of that of 300,⁵ we must admit in favor of its reality that the decemvirs were themselves exceptionally above appeal and that their laws guaranteed to the citizens an extensive use of the right.⁶ The appellant, however, had no legal means of enforcing his right against the magistrate; he could do no more than “throw himself on the mercy of the crowd, and trust that their shouts or murmurs would bend the magistrate to respect the law.”⁷ The first *læx Valeria*, accordingly, brought little real benefit to the citizens.⁸ The

¹ Cf. Fest. 297. 11–24; Cic. *Mil.* 3. 7; *Rep.* ii. 31. 54; Livy i. 26.

² Dion. Hal. iv. 25. 2; Livy i. 26. 5; Mommsen, *Röm. Staatsr.* ii. 11; *Röm. Strafr.* 474.

³ For the earlier literature on the *ius provocationis*, see Lange, *Röm. Alt.* ii. 542, n.

⁴ Cic. *Rep.* i. 40. 62; ii. 31. 53: “Legem ad populum tulit eam, quæ centuriatis comitiis prima lata est, ne quis magistratus civem Romanum adversus provocationem necaret neve verberaret”; 36. 61; Livy ii. 8. 2; 30. 5 f.; iii. 33. 9 f.; Val. Max. iv. 1. 1; Plut. *Popl.* 11; Pomponius, in *Dig.* i. 2. 2. 16; Dion. Hal. v. 19. 4; cf. Ihne, in *Rhein. Mus.* xxi (1866). 168.

⁵ Cic. *Rep.* ii. 31. 54; Livy iii. 55. 4; x. 9. 3–6; cf. Pais, *Storia di Roma*, I. i. 489.

⁶ Cic. *Rep.* ii. 31. 54: “Ab omni iudicio poenæque provocari indicant XII Tabulæ compluribus legibus; et quod proditum memoriæ est, X viros, qui leges scripserint, sine provocatione creatos, satis ostenderit reliquos sine provocatione magistratus non fuisse.”

⁷ Greenidge, *Leg. Proced.* 311. Varro, *L. L.* vi. 68: “Quiritare dicitur is qui quiritium fidem clamans implorat”; cf. Cic. *Fam.* 32. 3; Livy ii. 55. 5 f.; iv. 14 f.

⁸ Ihne, in *Rhein. Mus.* xxi (1866). 165 ff. Two cases of appeal, which indeed may be mythical, are mentioned by the annalists for the time before the decemviral legislation—that of Sp. Cassius, which is only one of several views as to his condemnation and death (Livy ii. 41; iv. 15. 4; Dion. Hal. viii. 77 f.; ix. 1. 1; 3. 2; 51. 2; x. 38. 3; Diod. xi. 37. 7; Cic. *Rep.* ii. 35. 60; Flor. i. 26. 7), and that of the plebeian M. Volscius Fictor for false testimony; Livy iii. 25. 2 f.

right was recognized and its application extended, as intimated above, by the Twelve Tables, in which various laws relating not only to capital crimes but to some of less importance granted an appeal to the people.¹ It was provided also by a special statute of the code that judgments as well as laws involving life or citizenship could be passed only by the *comitatus maximus*, which is evidently the *comitia centuriata*.²

The Valerian-Horatian law of appeal, 449, was directed against the recurrence of the decemvirate or any similar magistracy with absolute jurisdiction, and hence resembled neither the laws of the Twelve Tables referring to the subject nor the Valerian law of 509. It provided that any one who brought about the election of such a magistracy might be put to death with impunity,³ and is alleged to have been reinforced by a Duilian plebiscite of the same year, which set the penalty of scourging and death for the same offence.⁴ These regulations could not refer to the dictatorship, which was appointive not elective, and which continued to possess absolute jurisdiction for more than a century after the decemviral legislation.⁵

But legal rights by no means imply actual enjoyment; and the decemviral laws of appeal must have long remained substantially inoperative through lack of a power sufficiently interested in their enforcement; "the might of the few was stronger than the liberty of the commons."⁶ The right was limited, too, by the first milestone,⁷ and hence did not affect the *imperium militiae*.⁸ The only punishment of a magistrate for refusal to

¹ Cic. *Rep.* ii. 31. 54, quoted p. 240, n. 6. The statement of Cicero is too general; Greenidge, *Leg. Proced.* 312.

² Cic. *Leg.* iii. 4. 11: "De capite civis Romani nisi per maximum comitatum ollosque, quos censores in partibus populi locassint, ne ferunt"; 19. 44; *Sest.* 30. 65; 34. 73: "De capite non modo ferri, sed ne iudicari quidem posse nisi comitiis centuriatis"; cf. *Rep.* ii. 36. 61; Plaut. *Pseud.* 1232; Mommsen, *Röm. Staatsr.* ii. 578; Karlowa, *Röm. Rechtsgesch.* i. 409; Greenidge, *Leg. Proced.* 317; p. 268.

³ Cic. *Rep.* ii. 31. 54; Livy iii. 55. 4; cf. Mommsen, *Röm. Staatsr.* iii. 352, n. 2; Lange, *Röm. Alt.* i. 638; ii. 551; Greenidge, *Leg. Proced.* 318.

⁴ Livy iii. 55. 14; cf. 54. 15.

⁵ Livy iv. 13. 11 f.; vi. 16. 3 (385); vii. 4. 2 (362); viii. 33-35 (325; see p. 242, n. 5); Mommsen, *Röm. Staatsr.* ii. 164 f. with notes; *Röm. Strafr.* 476; Greenidge, *Leg. Proced.* 318; cf. p. 242.

⁶ Livy x. 9. 4.

⁷ Livy iii. 20. 7; Mommsen, *Röm. Staatsr.* i. 66 f.; iii. 352.

⁸ Lange, *Röm. Alt.* ii. 543; Mommsen, *ibid.*

grant an appeal even by the Valerian law of 300, was to be deemed wicked.¹ Furthermore the oft-recurring dictatorship was unrestricted by the law, being in this respect a temporary restoration of the regal office.² Not till after the enactment of the last Valerian statute did the people begin to enjoy in fact the privilege which had long been constitutionally theirs. The enforcement of the law, as in general of the rights of the citizens, was chiefly due to the plebeian tribunate, "the only sure protection even of oppressed patricians,"³ but itself a limitation on the jurisdiction of the assembly.⁴ At some unknown date after 325⁵ the dictator's authority within the city was subjected to appeal; and it has accordingly been suggested that this limitation was due to the Valerian law of 300.⁶

The practical establishment of the right of appeal ordinarily led the magistrate in the exercise of his disciplinary power to substitute light fines and imprisonment, which he had full power to enforce, for the heavier penalty of scourging.⁷ But

¹ Livy x. 9. 5: "Improbe factum." This denunciation might involve penal consequences according to Greenidge, *Leg. Proced.* 319 f. Mommsen, *Röm. Strafr.* 167, 632 f., supposes the expression to signify that the offending magistrate was to be treated as a private person and punished for murder. Some are of the opinion that it involved loss of citizenship, whereas others suppose its effect was simply moral; cf. Karlowa, *Röm. Rechtsgesch.* i. 429.

² Livy ii. 18. 8; 30. 5; iii. 20. 8; viii. 33 (dictator permits appeal); Dion. Hal. v. 75. 2 f.; vi. 58. 2; Zon. vii. 13. 13; Pomponius, in *Dig.* i. 2. 2. 18; Lydus, *Mag.* i. 37; Mommsen, *Röm. Staatsr.* ii. 163, n. 1; Lange, *Röm. Alt.* i. 756 f.

³ Livy ii. 55. 5; iii. 45. 8; 55. 6, 14; 56. 5; 67. 9; viii. 33. 7: "Tribunos plebis appello et provoco ad populum"; xxxvii. 51. 4; Dion. Hal. ix. 39. 1 f.; Mommsen, *Röm. Staatsr.* i. 277.

⁴ Livy iii. 24. 7; 25. 2; 29. 6; Lange, *Röm. Alt.* i. 840; ii. 544.

⁵ The appeal of Fabius from the jurisdiction of the dictator in 325 was granted not under compulsion but in grace; Livy viii. 35. 5. On the freedom of the dictatorship from this restriction in the period between 449 and 325, see p. 241, n. 5. The court mentioned by Livy ix. 26. 6 ff. (314) seems to have been an extraordinary quaestio under the presidency of a dictator; Mommsen, *Röm. Staatsr.* ii. 165, n. 6. On the subjection of his authority to appeal, see Fest. 198. 32: "Optima lex . . . in magistro populi faciendo, qui vulgo dictator appellatur, quam plenissimum posset ius eius esse significabat, ut fuit M'. Valerio M. f. Volusi nepotis, qui primus magister populi creatus est. Postquam vero provocatio ab eo magistratu ad populum data est, quae ante non erat, desitum est adici, 'ut optima lege,' utpote imminuto iure priorum magistrorum."

⁶ Mommsen, *Röm. Staatsr.* ii. 165; Greenidge, *Leg. Proced.* 319.

⁷ Cic. *Leg.* iii. 3. 6; Livy ii. 29. 4: "Ab lictore nihil aliud quam prendere prohibito"; ii. 55. 5; Dion. Hal. vi. 24. 2.

in case of crimes, especially perduellio and parricidium, public sentiment compelled him to prosecute the accused to the full extent of the law. In the former accusation the consul of the early republic appointed duumviri perduellioni iudicandae for each case as it arose.¹ This office is obscure because, without being formally abolished, it fell early into disuse, its function passing to the tribunate of the plebs. Of the three cases attributed by the sources to these duumviri, that of Horatius² belongs to the regal period, and is a mythical prototype of the republican procedure. The offence has the appearance of parricidium. Only by the broadest interpretation could perduellio be made to cover the murder of a sister.³ The second case is that of M. Manlius, 384, according to the more credible account,⁴ whereas Livy⁵ himself is of the opinion that the prosecutors were the plebeian tribunes. We may conclude, then, that the duumviri were still employed at this date.⁶ The third case is an unsuccessful attempt in 63 to revive the office for the trial of C. Rabirius.⁷ The first republican law of appeal must have empowered the comitia to order the appointment of these officials by the magistrate;⁸ and it seems probable that at a later date unknown to us they began to be elected by the

¹ Livy i. 26. 5: "Duumviro . . . qui . . . perduellionem iudicent secundum legem facio"; § 7: "Hac lege duumviri creati"; vi. 20. 12: "Sunt qui per duumviro, qui de perduellione acquirere creatos auctores sint damnatum." Creare applies to appointments though less commonly than to elections; cf. Livy ii. 18. 4 f.; 30. 5; iv. 26. 6; Fest. 198. 4 (of the dictator); Livy iv. 46. 11; 57. 6 (of the magister equitum). In vi. 20. 12, quoted above, Livy may possibly be thinking of election, which seems to have become the rule before the disuse of the office; cf. Greenidge, *Leg. Proced.* 304, 309.

² Livy i. 26; Fest. 297. 11.

³ *Dig.* xlviii. 4. 11: "Qui perduellionis reus est, hostili animo aduersus rem publicam uel principem animatus"; cf. Greenidge, *Leg. Proced.* 303.

⁴ Livy vi. 20. 12; see n. 1 above.

⁵ *Ibid.* vi. 19. 6 ff.

⁶ Cf. Ihne, in *Rhein. Mus.* xxi (1866). 177.

⁷ P. 258.

⁸ This comitial resolution may be anticipated in the account of the process against Horatius given by Livy i. 26. 5: "Duumviro . . . secundum legem facio"; cf. § 7: "Hac lege duumviri creati." The king, whose judgments were absolute, could not have thus been forced; hence more probably lex in these phrases is not a comitial act but the formula of appointment; Greenidge, *Leg. Proced.* 356 and n. 1. The procedure in the trial of C. Rabirius was in this respect similar; a law compelling the praetor to appoint duumviri is suggested by Cic. *Rab. Perd.* 4. 12.

people.¹ The function of the duumviri was to try the case and pronounce sentence, from which if condemnatory the accused had a right to appeal to the *comitia centuriata*.² From the analogy offered by the quaestorian procedure we may infer that the duumviri requested from a higher magistrate permission to take auspices for that assembly, over which they presided in the final trial.³

All capital crimes committed by a citizen against another were in a similar way referred by the consuls to the quaestores parricidii as their deputies.⁴ The activity of these officials is first mentioned by the annalists in connection with the trial of Sp. Cassius, not for murder but for *perduellio*.⁵ Lange's⁶ explanation that the quaestors were appointed duumviri for the trial would satisfy all requirements; yet in myths of this kind we need not expect absolute legal consistency.⁷ According to another, perhaps even earlier, version he was tried and condemned at home by his father.⁸ The second instance is the trial of M. Volscius, 459, for false testimony,⁹ which was likewise a capital crime. Their judicial competence was recognized by the Twelve Tables;¹⁰ and two capital cases are assigned to their jurisdiction after the decemvirate, (1) that of Camillus on an accusation variously stated by the ancient authorities;¹¹ he

¹ Dio Cassius, xxxvii. 27. 2, finds fault with the procedure against Rabirius on the ground that the duumviri for judging him were appointed by the praetor, not elected as they should have been "according to ancestral usage."

² Livy i. 26. 5; Pomponius, in *Dig.* i. 2. 2. 16; Cic. *Leg.* iii. 12. 27; Lange, *Röm. Alt.* ii. 544; Mommsen, *Röm. Staatsr.* ii. 617 f.

³ P. 104.

⁴ Greenidge, *Leg. Proced.* 303-5.

⁵ Cic. *Rep.* ii. 35. 60; Livy ii. 41. 11; Dion. Hal. viii. 77. 1; cf. Greenidge, *Leg. Proced.* 309.

⁶ *Röm. Alt.* i. 610; ii. 545.

⁷ Cf. the trial of Horatius for murder by the duumviri *perduellioni iudicandae*; p. 243.

⁸ Livy ii. 41. 10.

⁹ Livy iii. 24. 3; 25. 2.

¹⁰ Pomponius, in *Dig.* i. 2. 2. 23: "Quia . . . de capite civis Romani iniussu populi non erat lege permissum consulibus ius dicere, propterea quaestores constituebantur a populo, qui capitalibus rebus praesent: his appellabantur quaestores parricidii, quorum etiam meminit lex Duodecim Tabularum"; cf. Fest. 258. 29; ep. 221.

¹¹ Pliny *N. H.* xxxiv. 4. 13: "Camillo inter crimina obiecerit Sp. Carvilius quaestor, quod aerata ostia haberet in domo." According to Livy v. 23. 11; 32. 8 f., it was misappropriation of the Veientan spoil. Diodorus, xiv. 117. 6, states that according to one report the accusation was that he had driven white horses in his triumph. The appeal was to the *comitia centuriata*; Cic. *Dom.* 32. 86. This case indicates

avoided capital prosecution before the centuries by retiring into exile, and in his absence was condemned by the tribes to a fine of 15,000 or perhaps 100,000 asses: (2) that of T. Quinctius Trogus brought by the quaestor M. Sergius,¹ which must have taken place after 242.² The reason for the fewness of the known cases is to be sought in the circumstance that their jurisdiction was substantially limited to common crimes, whereas political crimes came at first before the duumviri and afterward before the tribunes of the plebs.³ The criminal jurisdiction of the quaestors must have continued till the institution of standing quaestiones.⁴

While the importance of the comitia centuriata as a criminal court was enhanced by the lex Valeria Horatia and the Duillian plebiscite of 449, which prohibited the election of a magistrate with absolute jurisdiction, the number of officials competent to bring capital actions before this assembly was increased as a result of that law of the Twelve Tables which enacted that all resolutions concerning the caput of a Roman citizen should be offered to the centuries only.⁵ Thereafter the tribunes were required to prefer their capital accusations before this assembly, for the summoning of which they, like the quaestors and the duumviri perduellioni iudicandae, requested the auspices of a higher magistrate, ordinarily after 367 of a praetor.⁶ For a time, probably till the Hortensian legislation, they were de-

either inconsistency in legal usage, quite possible in early time, or more probably the union of inconsistent traditions. The facts that Pliny mentions a quaestor apparently as prosecutor, not simply as witness (Lange, *Röm. Alt.* ii. 582), and that Cicero represents the trial as belonging to the centuries suffice to indicate a quaestorian prosecution before that assembly. Should we venture to bring consistency to so uncertain a story, we could suppose that in his absence, the tribunes, taking up the case, lightened the penalty to a fine.

¹ Varro, *L. L.* 90-92 (mutilated excerpts from the record of this trial, preserved in the *Commentaria Quaestorum* and containing part of the edict for summoning the assembly and the accused).

² That is, after the increase in the number of praetors; Lange, *Röm. Alt.* i. 884; ii. 551; Mommsen, *Röm. Staatsr.* ii. 543, n. 2.

³ P. 243, 248.

⁴ Cf. Mommsen, *Röm. Staatsr.* ii. 543 f.; Lange, *Röm. Alt.* i. 389, 884, 910; ii. 555.

⁵ P. 241.

⁶ Cf. Livy xxvi. 3. 9; xliii. 16. 11; Gell. vi. 9. 9; Karlowa, *Röm. Rechtsgesch.* i. 409.

pendent upon the patrician magistrates for this privilege.¹ According to our sources the tribunes, with the approval of the consuls,² entered upon their new sphere of judicial activity by bringing a capital charge against Appius Claudius and Sp. Oppius, past decemvirs, for misconduct in office, the specific charge being the abuse of justice in the interest of a person or of a party.³ The suicide of the accused prevented the trial. On the eight remaining decemvirs they passed in the same assembly a sentence of exile.⁴ M. Claudius, too, condemned for false testimony, was exiled, the death penalty being mitigated also in his case.⁵ The tribunes of 439 are said to have accused L. Minucius and C. Servilius Ahala for the part they had taken in the death of Sp. Maelius, and two years afterward Servilius was sentenced to exile by the *comitia centuriata*, to be recalled later by the same body. The charge against the former was false testimony, against the latter the putting to death of a citizen who had not been legally sentenced.⁶ Livy next mentions a charge, probably of *perduellio*, brought by the tribunes against Q. Fabius, 390, for having, in violation of the *ius gentium*, fought against the Gauls while he was an ambassador to them. He, too, is said to have died before the trial.⁷ All these cases are uncertain. If historical, they may represent the beginnings of capital jurisdiction of the tribunes, in rivalry with the *duumviri*; or they may in reality, like the case of M. Manlius, 384, already mentioned, have been *duumviral*. On either alternative they came before the *centuriate comitia*.

¹ Cf. Herzog, *Röm. Staatsverf.* i. 196.

² Livy iii. 59. 4; Dion. Hal. xi. 49. 3.

³ Livy iii. 56-8; Dion. Hal. xi. 46, 49.

⁴ Livy iii. 58. 10; Dion. Hal. xi. 49; Zon. vii. 18. 11.

⁵ Livy iii. 58. 10; Dion. Hal. xi. 46. 5; Gell. xx. 1. 53. False testimony in a case of this kind, which was *vindicta* not murder, was not capital; hence it did not ordinarily come before the tribunes; Mommsen, *Röm. Staatsr.* ii. 324, n. 6. The political importance of the case, however, was a sufficient motive to their undertaking it.

⁶ Livy iv. 16. 5 f.; 21. 3 f.; Cic. *Dom.* 32. 86; *Rep.* i. 3. 6; Val. Max. v. 3. 2 g; Lange, *Röm. Alt.* i. 668; ii. 553. Roman law regarded false testimony in capital cases as murder; hence the prosecution of Minucius might legally have come before the *quaestors*; Mommsen, *Röm. Staatsr.* ii. 324, n. 6.

⁷ Livy vi. 1. 6.

As we approach firmer historical ground, we hear of three accusations of unnatural lust alleged to have been brought by the tribunes of the plebs before the same comitia: (1) that against L. Papirius, 326,¹ (2) that against L. or M. Laetorius Mergus, a military tribune, quod cornicularium suum stupri causa appellasset,² (3) the case mentioned by Pliny and others against a person of unknown name, which probably belongs to this period.³ The second case seems to be a trial of official accountability, which fell within tribunician jurisdiction according to the usage of historical time; the others are too little known to be legally formulated.

In this period falls the attempted prosecution of Appius Claudius Caecus, 310, on the ground that he had not laid down the censorship at the end of the limit of eighteen months.⁴ The accusing tribune ordered him to be seized and imprisoned, but three colleagues interceded.⁵ About the same time M. Atilius Calatinus was unsuccessfully prosecuted on a charge of having betrayed Sora,⁶ probably in connection with the defection of that town to the Samnites in 315.⁷

In reviewing the cases said to have been brought by tribunes before the comitia centuriata it is surprising to find the period from the institution of the office to the trial of Q. Fabius, 390, swarming with such prosecutions, whereas for the century intervening between that date and the Hortensian legislation comparatively few cases are recorded and those of little significance.⁸ These circumstances tend to prove that the cases assigned to the earlier and less known period either belong mostly to the jurisdiction of the duumviri or of the quaestors rather than of the tribunes, or are in great part mythical, and that the tribunes, therefore, exercised no extensive capital jurisdiction

¹ Livy viii. 28; Dion. Hal. xvi. 5 (9); Suid. s. Γάιος Λαιτῳπίος. Mommsen, *Röm. Staatsr.* ii. 325, n. 1, denies that a case of the kind could come before the tribunes.

² Dion. Hal. xvi. 4 (8); Val. Max. vi. 1. 11; Suid. *ibid.* This prosecution could be brought on the ground of misconduct of office; Mommsen, *ibid.*

³ Pliny, *N. H.* viii. 45. 180; Val. Max. viii. 1. 8.

⁴ Livy ix. 33. 4 f.

⁵ *Ibid.* 34. 26.

⁶ Val. Max. viii. 1. abs. 9.

⁷ Livy ix. 23. 2; Mommsen, *Röm. Staatsr.* ii. 323, n. 5.

⁸ The same thing is true of the finable actions of this period; p. 290.

before the enactment of the Hortensian law.¹ We are led thence to the conclusion that either by an article of the statute of Hortensius or at least as a recognized consequence of the high place in the government assured the tribunes by it, the jurisdiction of these magistrates in political cases was freed from every restraint. At this time they succeeded wholly to the place of the duumviri. The cases of which the tribunes had cognizance were thereafter exclusively political, whereas the questorian jurisdiction was confined to murder and other common crimes. This distinction was not a limitation upon the power of the tribunes, who if they chose might have superseded the quaestors as easily as they had superseded the duumviri. It was rather a division of functions adopted by the tribunes themselves in view of their own political character and on the basis of the relative dignity of the two offices. The chief judicial function of the tribunes, accordingly, was to hold officials responsible for their administration, though occasionally they called private persons to account for their conduct as citizens. All grades of officials were within their jurisdiction, but most of the cases were against the higher magistrates.

The first tribunician case of the kind after the Hortensian legislation, and the first which is absolutely free from historical doubt, is that brought against P. Claudius Pulcher on the ground that as consul, 249, he fought the naval battle off Drepana contrary to auspices, thereby losing his fleet. After the comitia had been interrupted by a storm, the intercession of colleagues against the resumption of the trial saved him from the death penalty. As the result of a new trial before the tribes, however, he was fined 120,000 asses, 1000 for each ship lost.² His colleague, L. Junius, by suicide escaped condemnation on a charge of perduellio.³ In 212 two tribunes of the plebs prose-

¹ This view has no other warrant than the uncertainty of our sources for the fifth and early fourth centuries B.C. That the tribunes should make early gains in jurisdiction, to be afterward partially lost, is thoroughly consistent with the law of plebeian progress, which consisted, not in a steady forward movement, but in successive advances and retreats.

² Livy, ep. xix; Cic. *Div.* ii. 33. 71; *N. D.* ii. 3. 7; Polyb. i. 52. 1-3; Schol. Bob. 337; Val. Max. viii. 1. abs. 4; Lange, *Röm. Alt.* ii. 556; Mommsen, *Röm. Staatsr.* ii. 321, n. 1; iii. 357, n. 1; p. 317 below.

³ Cic. *Div.* ii. 33. 71; *N. D.* ii. 3. 7; Val. Max. i. 4. 3.

cuted M. Postumius Pyrgensis, a publican, before the tribes for fraud, setting the penalty at 200,000 asses; but the accused with his friends violently broke up the assembly, whereupon the tribunes, dropping the original charge, prosecuted him for *perduellio*,¹ we should suppose before the centuries.² Among the complaints urged against him by the consuls in the senate were that "he had wrested from the Roman people the right of suffrage, had broken up a *concilium plebis*, had reduced the tribunes to the rank of private persons, had marshalled an army against the Roman people, seized a position, and cut the tribunes off from the plebs, and had prevented the tribes from being called to vote." Specifically the crime must have been *perduellio*.³ Before the day of trial he withdrew into exile. In his absence the plebs on the motion of Sp. and L. Carvilius decreed that he was legally in banishment, that his property should be confiscated, and that he should be interdicted from fire and water. In this connection it should be noticed that whereas the banishment of a citizen by *lex* or *iudicium* was the exclusive right of the centuries,⁴ the tribes were competent to decree him an exile after his voluntary retirement.⁵ Some of the coadjutors in the violence of the publican above mentioned left their bail and followed him into exile; others were imprisoned to await capital trial, with what result the historian does not inform us.⁶

In the same year Cn. Fulvius, a praetor, met with military reverses through gross cowardice,⁷ and in the following was prosecuted in a finable action by a tribune of the plebs for having corrupted his army by the example of his unsoldierly habits. Finding in the course of the trial that the fault of the magistrate was far more serious than had been imagined, and that the people were in a temper to vote the extreme penalty, the prosecutor

¹ P. 318.

² Greenidge, *Leg. Procd.* 328 f., wrongly assumes that in this case the charge of *perduellio* came before the tribes; the interdiction of the man by the tribes after his departure was not a *iudicium* but a *lex*.

³ Cf. Mommsen, *Röm Staatsr.* ii. 299.

⁴ P. 241.

⁵ P. 267, 446.

⁶ Livy xxv. 3 f.

⁷ Livy xxv. 20. 6 ff.; p. 318, n. 8 below. Livy gives us to understand that defeat resulting from ignorance or temerity could not be made a ground of prosecution.

changed the form of accusation to *perduellio* on the ground that such cowardly conduct in a commander threatened the existence of the state. In this instance, too, the accused avoided trial by withdrawing into exile.¹ In 204 by a decree of the senate a special commission, consisting of the praetor for Sicily with a council of ten senators,² was appointed for the trial of a legate of Scipio, Q. Pleminius, on the charge that he had robbed the temple of Persephone in Locri and had violently oppressed the Locrians.³ The commission brought him and his accomplices in chains to Rome and cast them in prison to await their trial for life before the centuries.⁴ The day of trial was continually deferred, till finally Pleminius, now charged with the instigation of a plot to burn the city, was put to death in prison.⁵ The fate of his accomplices is unknown.⁶ Livy⁷ remarks that while Pleminius was languishing in jail the wrath of the populace gradually changed to sympathy, to such an extent doubtless as to convince the authorities of their inability to secure a popular verdict in favor of the death penalty. In fact since the death of M. Manlius Capitolinus, 384, no example of the execution of a death sentence pronounced by the assembly is recorded in history.⁸ But the magistrate probably often inflicted corporal punishment in violation of the third Valerian law. To put an end to this abuse, and at the same time to embody in legal form the popular feeling against the application of the death penalty to citizens, a Porcian law absolutely forbade the scourging or slaying of a citizen under the *imperium domi*, the article pro-

¹ Livy xxvi. 2. 7 through ch. 3; Mommsen, *Röm. Staatsr.* ii. 320, n. 2, 321, n. 2; Lange, *Röm. Alt.* ii. 556; Greenidge, *Leg. Proced.* 329 f. On the right to change the form of action, see p. 287.

² The two plebeian tribunes and the aedile who accompanied this commission were sent to recall Scipio, should he be found responsible for the conduct of his legate; Livy xxix. 20. 11. They do not seem to have been members of the commission.

³ Livy xxix. 8. 6 ff.; chs. 16-22.

⁴ Livy xxix. 19. 5; 22. 7. The form of *comitia* is inferred from the circumstances.

⁵ Livy xxxiv. 44. 7 f.

⁶ Livy xxix. 22. 8 f. (cf. xxxi. 12. 2); Diod. xxvii. 4; cf. Val. Max. i. 2. 21; Appian, *Hann.* 55.

⁷ XXIX. 22. 8.

⁸ Lange, *Röm. Alt.* ii. 557. The date of the execution of C. Veturius in pursuance of a vote of the people (Plut. *C. Gracch.* 3) is unknown.

hibiting the sentence of death being afterward reënforced by other enactments.¹ There has been much discussion as to the authorship of this law; probably it was the work of M. Porcius Cato the Elder in his praetorship, 198.² Another Porcian law, probably of P. Porcius Laeca, praetor in 195, extended the right of appeal to Roman citizens who were engaged in the affairs of peace outside the city, in Italy and the provinces, and were therefore under the military imperium.³ According to this law the citizen who appealed was sent to Rome for trial by the appropriate civil authorities. Still later the third Porcian law, which Lange⁴ conjecturally assigns to L. Porcius Licinus, consul in the year of the elder Cato's censorship, 184, seems to have been passed for the benefit of Roman soldiers. We learn from Polybius,⁵ who wrote later than the date last mentioned, that the military tribunes were accustomed in court-martial to condemn common soldiers for neglect of sentinel duty and that the condemned were cudgelled and stoned, often to death, by their fellow-soldiers. He also speaks of the punishment of entire maniples by decimation. Under Scipio Aemilianus, 133, the Roman who neglected duty was flogged with vine stocks, the

¹ Sall. *Cat.* 51. 21 f.: "Quamobrem in sententiam non addidisti, ut prius verberibus in eos animadvorteretur? An quia lex Porcia vetat? At aliae leges item condemnatis civibus non animam eripi sed exilium permitti iubent"; 51. 40: "Postquam res publica adolevit et multitudine civium factiones valuer, circumvenire innocentes, alia huiusce modi fieri coepere, tum lex Porcia aliaeque paratae sunt, quibus legibus exilium damnatis permissum est"; Cic. *Rab. Perd.* 3. 8: "De civibus Romanis contra legem Porciam verberatis aut necatis"; Pseud. Sall. *in Cic.* i. 5: charges against Cicero that in putting Roman citizens to death he has abolished the lex Porcia. Livy x. 9. 4: "Porcia tamen lex . . . gravi poena, si quis verberasset necassetve civem Romanum, sanxit"; cf. Cic. *Rab. Perd.* 4. 12 f.; *Verr.* v. 63. 163; Gell. x. 3. 13. Greenidge, *Leg. Proced.* 320, doubts whether it allowed exile to one condemned by a vote of the people. Against him is Polyb. vi. 14. 7, quoted p. 217, n. 5.

² Livy xxxii. 7. 8; Fest. 234. 10; The opinion here given is that of Lange, *Röm. Alt.* ii. 205, 558. A different view is represented by Orelli-Baiter, Cic. *Op.* viii. 3. 252 f.

³ The decisive evidence is a coin, described by Mommsen, *Röm. Münzwesen*, 552, representing an armed man evidently in the act of condemning a civilian, whose appeal is indicated by the word PROVOCO beneath. The inscription on the obverse P. LAECA reveals the author of the law.

⁴ *Röm. Alt.* i. 249; ii. 559.

⁵ VI. 37 f.

foreigner with cudgels.¹ Cicero² intimates that in his own time there was no appeal from the judgment of commanders; and in fact it is impossible to understand how discipline could otherwise be maintained. Evidence to the contrary is scant and uncertain. The person against whom an accusation of desertion was brought before the tribunes of the plebs in 138 seems to have claimed to be a civilian, and on that ground appealed to the tribunes. When proved guilty he was flogged and sold as a slave, probably by a judgment of the military authorities.³ In 122 Livius Drusus proposed to exempt Latin soldiers from flogging.⁴ While informing us that in 108 a commander had a right to scourge and put to death a Latin official, Sallust⁵ intimates that he had less authority over a Roman. In the time of the emperors, on the other hand, soldiers were subject to the death penalty as in the time of Polybius.⁶ All these circumstances may be best explained by supposing that the third Porcian law permitted the infliction of flogging and death on Roman soldiers by the judgment only of a court-martial.⁷ This difficult subject is further complicated by the statement of Cicero⁸ that the three Porcian statutes introduced nothing new excepting by way of penalty. Interpreted in the light of other information given by various authors, including Cicero himself, these statutes simply extended the right of appeal by adapting the Valerian principle to new conditions, and substituted exile in

¹ Livy, ep. lvii; cf. Cic. *Rep.* i. 40. 63: "Noster populus in bello sic paret ut regi."

² *Leg.* iii. 3. 6: "Militiae ab eo qui imperabit provocatio nec esto," which however, Mommsen, *Röm. Staatsr.* ii. 117, n. 2 (cf. *Röm. Strafr.* 31, n. 3) sets down as merely a pious wish of the author.

³ Livy, ep. lv: (In the consulship of P. Cornelius Nasica and D. Junius Brutus) "C. Matienus accusatus est apud tribunos plebis, quod exercitum in Hispania deseruisset, damnatusque sub furca diu virgis caesus est, et sestertio nummo venit." The new epitome, l. 207-9, speaks of desertores who on this occasion were thus flogged and sold. It is not known that the tribunes tried cases of desertion or that they inflicted the kind of punishment here described. C. Titius, sent for trial to the tribunes on the charge of having stirred up a mutiny (Dio. Cass. *Frag.* 100; year 89), may have been a civilian.

⁴ Plut. *C. Gracch.* 9.

⁵ *Ing.* 69.

⁶ Modestinus, in *Dig.* xlix. 16. 3. 15; Menander, *ibid.* 16. 6. 1 f.

⁷ An example of a military consilium is given by Livy xxix. 20 f.

⁸ *Rep.* ii. 31. 54: "Neque vero leges Porciae, quae tres sunt trium Porciorum, ut scitis, quicquam praeter sanctionem attulerunt novi."

place of scourging and death. In the relation between the accused and the civil court the cry "*civis Romanus sum*" was thereafter a sufficient protection from bodily injury.¹

In the period to which the Porcian laws belong falls the accusation of *perduellio* brought by the tribune P. Rutilius Rufus against the censors C. Claudius and Ti. Sempronius Gracchus, while they were in office, 169. The charge against Gracchus was disregard of the tribunician *auxilium*, against his colleague the interruption of a *concilium plebis* (*quod contionem ab se avocasset*). The accused, foregoing the privilege of their magistracy, consented to a trial, which came before the *comitia centuriata*. Claudius narrowly escaped condemnation, whereupon the case against Gracchus was dropped.²

The increasing number of special judiciary commissions and the institution of standing courts limited more and more the judicial activity of the centuriate assembly; but the tribunes of the plebs kept alive the feeling of popular sovereignty in this sphere by the occasional prosecution of some notorious offender.³ The continuance of the centuriate judicial function is proved by the Cassian plebiscite of 137, which provided for the use of the ballot in all *iudicia populi* excepting in *perduellio*,⁴ and by the *lex Caelia*, 108, which removed the exception.⁵

The limitation upon popular jurisdiction by the special court is said to have begun as early as 414, when, according to Livy,⁶ a *senatus consultum* authorized the appointment of a *quaestio extraordinaria* to discover and punish the murderers of M. Postumius, a tribune of the soldiers with consular power. The plebs, consulted as to the presidency of the court, left it to the consuls. The instance may be an anticipation of later usage. The case of wholesale poisoning by Roman matrons, 331, was investigated, and a hundred and seventy matrons were condemned, by an extraordinary court, which evidently owed its existence to a *senatus consultum* without the coöperation of

¹ Cic. *Verr.* v. 62. 162.

² Livy xliiii. 16. 8 ff.

³ Polyb. vi. 14. 6; cf. Lange, *Röm. Alt.* ii. 560.

⁴ Cic. *Brut.* 25. 97; 27. 106; *Leg.* iii. 16. 37; *Sest.* 48. 103; Schol. Bob. 303; Cic. *Frag.* A. vii. 50; Ascon. 78; Pseud. Ascon. 141 f.; Orelli-Baiter, Cic. *Op.* viii. 3. 278 f.

⁵ Cic. *Planc.* 6. 16.

⁶ IV. 50. 6 ff.

the people.¹ The same is true of the quaestio appointed by the senate under dictatorial presidency in 314 to inquire into charges of conspiracy of the leading men in certain allied states. The dictator extended the inquiry to Rome, and after his resignation the consuls continued the work. Livy's account of this affair assumes that the senate had full power to appoint such commissions.² It did in fact possess the right without the coöperation of the people to institute quaestiones extraordinariae for the trial of allies or other aliens in crimes which menaced the security of Rome. In the period between the Hortensian legislation and the Gracchi in two recorded instances it dared on its own responsibility to appoint such courts for the trial of citizens.³ These were usurpations; for as the laws of appeal forbade the putting to death of a citizen unless condemned by the people, a special court with capital jurisdiction over citizens could not be constitutionally established excepting with the consent of the assembly. This right of the people was considered a legislative equivalent of their judicial power, which the vast expansion of their state made it impossible for them directly to exercise.⁴ The court which tried and condemned the insurgent garrison of Rhegium in 270 was instituted accordingly by a plebiscite authorized by a senatus consultum.⁵ Most probably the court in this case was the senate itself, just as in 210, when the plebiscite of L. Atilius gave it full power to judge and punish the Campanians for revolt.⁶ The appointment of special courts for the detection and punishment of aliens for illegal usurpation of the citizen-

¹ Livy viii. 18; Val. Max. ii. 5. 3.

² IX. 26.

³ (1) In 186 for the trial of the Bacchanalians (Livy xxxix. 8-19); (2) in 180 two courts for the detection and trial of poisoners in Rome and Italy (Livy xl. 37). The two courts established in 186 for the trial of poisoners and for putting down the last of the Bacchanalians are mentioned by Livy xxxix. 41 without a hint as to the manner of their appointment; cf. Greenidge, *Hist. of Rome*, i. 135, n. 4.

⁴ Polyb. vi. 16. 2; Cic. *Dom.* 13. 33.

⁵ Dion. Hal. xx. 7. Though no mention is here made of a quaestio extraordinaria, we may assume one for every such instance. In actual iudicia populi the senate had no part.

⁶ Livy xxvi. 33 f.

ship, which belonged originally to the senate, began in 177 to be shared by the people.¹

Similar in character to the special judiciary commission appointed by the senate, but far more sweeping in effect, was the *senatus consultum ultimum* ("videant consules, ne quid res publica detrimenti capiat"), which in crises armed the consuls with absolute power of life and death over the citizens.² By these means the senate at its pleasure circumvented the laws of appeal on the plea that the accused had ceased to be citizens.³ Against this abuse Ti. Gracchus planned a new law of appeal, which he did not live to see enacted.⁴ His own followers were ruthlessly condemned without the privilege of appeal by an extraordinary *quaestio* under P. Popillius Laenas, consul in 132.⁵ Probably a similar court was appointed after the revolt of Fregellae.⁶ To put an end to such circumvention of a well-established right of the people, C. Gracchus in his first tribunate, 123, carrying into effect the plan of his brother, passed the often mentioned *lex Sempronia de provocatione*, which absolutely forbade capital sentence upon a citizen without an order

¹ The following pre-Gracchan *quaestiones extraordinariae*, according to our authorities, owed their existence to a popular vote. (1) The *lex de pecunia regis Antiochi* of the two Q. Petillii, tribunes in 185, for the establishment of a special court to try L. Scipio Asiagenus and some others for the misappropriation of public money; Livy xxxviii. 54, p. 399 below. — (2) The plebiscite of M. Marcius Sermo and Q. Marcius Scylla, tribunes in 172, directed the senate to establish a special court for the trial of M. Popillius on the charge of having unjustly subjugated and enslaved the Ligurians; Livy xlii. 21. 5. — (3) By the *lex Caecilia*, 154, a special *quaestio repetundarum* was established for the trial of L. Lentulus, retired consul of 156; Val. Max. vi. 9. 10. — (4) Another special court for the trial of L. Hostilius Tubulus on the charge of having accepted bribes while president of a murder court (*quaestio inter sicarios*) was ordered by a plebiscite of P. Mucius Scaevola in 141, whereupon the accused went into exile; Cic. *Fin.* ii. 16. 54; iv. 28. 77; v. 22. 62; *N. D.* i. 23. 63; iii. 30. 74; *Att.* xii. 5 b; Ascon. 22; Mommsen, *Röm. Strafr.* 197.

² Lange, *Röm. Alt.* i. 728. The formula varied with the occasion, and other magistrates were often associated with the consuls in this supreme power.

³ Cic. *Cat.* i. 11. 28: "Numquam in hac urbe, qui a re publica defecerunt, civium iura tenuerunt"; Mommsen, *Röm. Staatsr.* iii. 359; Lange, *Röm. Alt.* ii. 560.

⁴ Plut. *Ti. Gracch.* 16; p. 368 below. The idea of Tiberius is to be inferred from the law which his brother afterward passed.

⁵ Plut. *C. Gracch.* 4; Cic. *Lael.* 11. 37; *CIL.* i². p. 148.

⁶ Plut. *C. Gracch.* 3; cf. Greenidge, *Hist. of Rome*, i. 172.

of the people.¹ The wording indicates that it was intended not to do away with extraordinary courts and powers, but to allow their establishment in no other way than by popular vote.² It reiterated, too, the article of the Porcian statute which absolutely forbade the infliction of the death penalty on civilians.³ Far, however, from transferring the jurisdiction of the assembly to the quaestiones, the Sempronian law evidently confirmed the right of the people by enacting that the tribunes might bring the violator of that law before the comitia on a charge of perduellio, for which it mentioned the penalty of interdict from fire and water.⁴ It held responsible not only the magistrate charged with the extraordinary commission, but probably also the senator who moved or supported the measure which called it into being.⁵ The entire Sempronian law was made retroactive, so as to cover the case of Popillius, who thereupon fled into exile to avoid trial. The interdict was accordingly decreed by the tribes on the motion of Gaius.⁶ Rupilius, the colleague of Popillius, seems to have suffered a similar punishment.⁷

In 120 the tribune Decius prosecuted for perduellio L. Opius, who, as consul in 121, armed with the senatus consultum ultimum, had caused the death of C. Gracchus. The accused was acquitted.⁸ Ihne⁹ considers this prosecution to have been

¹ Cic. *Rab. Perd.* 4. 12: "C. Gracchus legem tulit, ne de capite civium Romanorum iniussu vestro iudicaretur"; *Cat.* iv. 5. 10; *Verr.* v. 63. 163; *Sest.* 28. 61; Schol. Gronov. 412: "Lex Sempronia iniussu populi non licebat quaeri de capite civis Romani"; Schol. Ambros. 370; Plut. *C. Gracch.* 4; p. 371 below.

² For examples of special courts afterward instituted, see p. 390.

³ Sall. *Cat.* 51. 40; Cic. *Cat.* i. 11. 28; iv. 5. 10.

⁴ Cic. *Dom.* 31. 82 f.; Plut. *C. Gracch.* 4; cf. Lange, *Röm. Alt.* ii. 561. It is not probable, as Greenidge, *Leg. Proced.* 330; *Hist. of Rome*, i. 201, has assumed, that the Sempronian law transferred jurisdiction in such cases from the centuries to the tribes. The comitia tributa had long exercised the right to condemn those who had fled into exile to avoid trial; p. 249, 267, 257, n. 5 (3).

⁵ Cic. *Sest.* 28. 61; cf. Dio Cass. xxxviii. 14. 5; Greenidge, *Hist. of Rome*, i. 200 f.

⁶ Cic. *Dom.* 31. 82; *Leg.* iii. 11. 26; cf. *Cluent.* 35. 95; Herzog, *Röm. Staatsverf.* i. 465.

⁷ Vell. ii. 7. 4.

⁸ Livy, ep. lxi: "Quod indemnatos cives in carcerem coniecisset" (Mommsen reads "in carcerem necasset" or "in carcerem coniectos necasset"; *Röm. Staatsr.* ii. 111, n. 1); Cic. *Part. Or.* 30. 104, 106; *Orat.* ii. 25. 106; 30. 132; Lange, *Röm. Alt.* ii. 562; iii. 50; Greenidge, *Hist. of Rome*, i. 278-80.

⁹ *History of Rome*, v. 5-7. His view is an inference from the circumstances.

instigated by the optimates in order to settle once for all and in their favor the question as to the legality of special courts which were called into being by an act of the senate alone. In that case acquittal was a foregone conclusion. In 119 the popular party met with greater success in the prosecution of C. Papirius Carbo, whom it hated as a renegade.¹ The charge was probably *perduellio*, though the details are unknown.²

The jurisdiction of the *comitia* in criminal cases suffered more extensive curtailment from the standing courts, — *quaestiones perpetuae*, — the first of which was established in 149 for the trial of Roman officials accused of extortion — *repetundae* — committed in the provinces or in Italy.³ As the object of the prosecutors was in the main the recovery of extorted property, the court was essentially civil, and seemed, therefore, to the Romans no infringement of popular rights; yet even before Sulla the principle began to apply to distinctly criminal cases.⁴ Notwithstanding this development several accusations were brought before the centuriate assembly in the period between the Gracchi and Sulla.⁵ The latter increased the number

¹ The prosecutor was L. Crassus; Cic. *Brut.* 43. 159; cf. *Orat.* i. 10. 40; ii. 40. 170; *Ferr.* II. iii. 1. 3; Val. Max. vi. 5. 6.

² Valerius Maximus, iii. 7. 6, assumes that the accused went into exile; Cicero, *Fam.* ix. 21. 3, informs us of a rumor that he committed suicide. Both reports may be true; Greenidge, *Hist. of Rome*, i. 282; cf. Lange, *Röm. Alt.* iii. 51.

³ P. 358.

⁴ Mommsen, *Röm. Staatsr.* ii. 223 ff.

⁵ (1) After the case against Carbo may be mentioned the accusation of *perduellio* against C. Popillius Laenas, 107, on the ground of a disgraceful surrender to the Tigurini. It was on this occasion that the ballot was first used in a trial for *perduellio*. The accused seems to have been condemned to exile; Cic. *Leg.* iii. 16. 36; *Herenn.* i. 15. 25; iv. 24. 34; Oros. v. 15. 24. This case, which resembles those of far earlier time, has nothing to do with violation of the right of appeal; (Cic.) *Herenn.* *ibid.* — (2) Similar in this respect was the prosecution of Q. Fabius Maximus Servilianus for the murder of his son. The accused went into exile before judgment was pronounced; Oros. v. 16. 8; Val. Max. vi. 1. 5. — (3) More famous is the prosecution of Q. Caecilius Metellus Numidicus, 100, by L. Appuleius Saturninus because the former refused to swear to maintain the agrarian law of the latter. Technically the charge was that Metellus refused to do his duty as a senator. The accused withdrew into exile before the trial, whereupon, by vote of the assembly, he was interdicted from fire and water; Livy, ep. lxx; Appian, *B. C.* i. 31. 137-40; Cic. *Dom.* 31. 82; *Sest.* 16. 37; 47. 101. — (4) Decianus, tribune of the plebs, 97, in accusing P. Furius, tribune of the preceding year, let fall some complaint regarding the murder of Saturninus, and on that ground was accused, probably by a tribune of the plebs, and condemned to exile; Cic. *Rab. Perd.* 9. 24; Schol. Bob. 230. —

of quaestiones to seven and brought all crimes within their cognizance. The questorian jurisdiction in cases of murder had already passed to the quaestio inter sicarios, established between 149 and 141;¹ and now Sulla transferred cases of perduellio from the jurisdiction of the tribunes to the quaestio maiestatis.² Although restored to the tribunes in 70, it was for the remainder of the republican period exercised by them on special occasions only, for the quaestio maiestatis still existed. With the establishment of the principate the jurisdiction of the people finally vanished.³

The revolutionary character of the period after Sulla is illustrated by the case of perduellio against C. Rabirius⁴ brought in 63 by a tribune of the plebs, T. Atius Labienus. Rabirius was charged with complicity in the murder of L. Appuleius Saturninus, the famous tribune of the year 100. Labienus proposed and carried a plebiscite requiring the praetor to appoint duumviri for the trial, whereas it was generally held at the time that these officials should have been elected by the people. It was also enacted, in violation of the Porcian and Sempronian laws, that in case of conviction the accused should be crucified on the Campus Martius. C. and L. Caesar, appointed duumviri, brought the case before the comitia centuriata, which were prevented from giving their verdict by the removal of the flag from Janiculum.⁵ The object of the trial was not to

(5) The prosecution of M. Aemilius Scaurus for maiestas by Q. Varius, tribune, Dec. 91, was withdrawn in the second anquisitio; Ascon. 19, 21 f.; (Aurel. Vict.) *Vir. Ill.* 72. 11; Quintil. v. 12. 10; Cic. *Scaur.* 1, 3; *Sest.* 47. 101. — (6) L. Cornelius Merula and Q. Lutatius Catulus, 87, avoided trial, probably for perduellio, by suicide; Diod. xxxviii. 4; Appian, *B. C. i.* 74. 341 f. — (7) On the first day of the following year, 86, P. Popillius Laenas, tribune of the plebs, hurled from the Tarpeian Rock Sextus Lucilius (or Licinius?), tribune of the preceding year, and set a day of trial for the colleagues of the latter. The accused fled to Sulla and in their absence were interdicted from fire and water. They were charged with perduellio; their offence was the veto of the popular measures of Cornelius Cinna. This is the only certain case of calling retired tribunes to account for their official conduct, and may be regarded as a symptom of the revolution then in progress; Vell. ii. 24; Livy, ep. lxxx; Dio Cass. *Frag.* 102. 12; Plut. *Mar.* 45.

¹ P. 255, n. 1 (4).

² Cic. *Verr.* i. 13. 38; cf. Mommsen, *Röm. Staatsr.* ii. 326.

³ Dio Cass. lvi. 40. 4; Mommsen, *Röm. Staatsr.* ii. 326; iii. 359 f.

⁴ P. 243.

⁵ P. 203, n. 2.

punish the guilty, but to discredit the senate, to which the accused belonged.¹ The decline of the idea of popular sovereignty is further indicated by the agrarian rogation of the tribune P. Servilius Rullus, 63, an article of which, in violation of the *lex Valeria Horatia de provocatione*, ordered the appointment of decemviri agris adsignandis without appeal.²

The procedure was the same in all finable and capital actions. In a case subject to appeal the magistrate, after a preliminary inquiry (*quaestio*), summoned the people to *contio* on the third day³ for a thorough examination (*anquisitio*).⁴ The trumpeter blew his horn before the door of the accused, and cited him to appear at daybreak in the place of assembly.⁵ Acting as accuser, the magistrate addressed the *contio* and produced his witnesses. Then came the witnesses for the defence, the statement of the accused, and the pleading of his counsel. These proceedings filled three *contiones* separated from one another by a day's interval. At the end of the third day's session the magistrate acquitted the accused or condemned him and fixed the penalty. In case of condemnation, the accused if dissatisfied appealed. The magistrate then put his sentence in the form of a rogation and set a date for the *comitia*,⁶ which could be held only after an interval of a *trinum*

¹ Cic. *Rab. Perd.*; Dio Cass. xxxvii. 26 ff.; Suet. *Caes.* 12; Lange, *Röm. Alt.* ii. 563 f.; iii. 240; Drumann-Gröbe, *Gesch. Roms*, iii. 150-5; Wirz, in *Jahrb. f. Philol.* xxv (1879). 177-201. In the opinion of Mommsen, *Röm. Staatsr.* ii. 298, n. 3; 615, n. 2, following Niebuhr, a tribunician accusation involving a fine was then introduced, and the oration of Cicero was delivered in this second trial. Drumann-Gröbe, *ibid.*; Greenidge, *Leg. Proced.* 357 f.; Schneider, *Process des Rabirius* (Zürich, 1899), and others maintain that Cicero spoke in the trial conducted by the duumviri and that after it was dropped no further accusation was brought. Wirz, *ibid.*, supposes that the senate quashed the process of the duumviri on the ground of illegality, that the accuser (Labienus) then brought a tribunician accusation for *perduellio*, but intimated a possible finable action in addition, and that the trial was ended, without resumption, by the hauling down of the flag.

² Cic. *Leg. Agr.* ii. 13. 33: "Orbis terrarum gentiumque omnium datur cognitio sine consilio, poena sine provocatione, animadversio sine auxilio"; p. 435.

³ Cic. *Har. Resp.* 4. 7.

⁴ *Anquisitio* seems to mean an examination on both sides—including testimony for and against the accused; Fest. ep. 22; Greenidge, *Leg. Proced.* 345, n. 3.

⁵ Varro, *L. L.* vi. 91 f.

⁶ Cic. *Dom.* 17. 45: "Cum tam moderata iudicia populi sint a maioribus constituta . . . ne inprodicta die quis accusetur, ut ter ante magistratus accuset intermissa

nundinum,¹ unless the accused desired an earlier trial.² Some scholars, however, hold the theory that a magistrate, recognizing the limitation of his competence, might bring the case directly to the comitia without the formality of a condemnation and appeal.³ The penalty proposed in the rogation was not necessarily the same as at first announced; for the trial might bring to light facts to mitigate or to aggravate the sentence. The presentation of the case to the comitia by the magistrate was termed the fourth accusation.⁴ If anything prevented the voting in the comitia, the accused was discharged,⁵ and could not be legally brought to trial again for the same offence excepting under a different form of action.⁶

Schulze, C. F., *Volksversammlungen der Römer*, 307-40; Hüllmann, K. D., *Staatsrecht des Altertums*, 334-54; Huschke, Ph. E., *Verfassung des Königs Servius Tullius*, chs. vii, xi; Wöniger, A. T., *Sacralsystem und das Provocationsverfahren der Römer*; Peter, C., *Epochen der Verfassungsgeschichte der röm. Republik, mit besonderer Berücksichtigung der Centuriatcomitien und der mit diesen vorgegangenen Veränderungen*; *Studien zur röm. Geschichte*, 54 ff.; Schwegler, A., *Röm. Geschichte*, see index, s. Centuriatcomitien; Ihne, W., *History of Rome*, iv. 10 ff.; Mommsen, *Röm. Staatsrecht*, iii. 300 ff.; *Röm. Strafrecht*, 151-74, 473-8, 632-5; Mommsen and others, *Zum ältesten Strafrecht der Kulturvölker*, especially 31-51 by H. F. Hitzig; Lange, L., *Röm. Altertümer*, ii. 516-33, 541-65, 597-613, see also indices of vols. i-iii, s.v.; Madvig, J. N., *Verfassung und Verwaltung des röm. Staates*, i. 226-34; Herzog, E., *Geschichte und System der röm. Staatsverfassung*, i. 1068-1119, see also index, s.v.; Willems, P., *Droit public Romain*, 159 f., 172, 176 ff.; Mispoulet, J. B., *Institutions politiques des*

die, quam multam inroget aut iudicet, quarta sit accusatio trinum nundinum producta die, quo die iudicium sit futurum, tum multa etiam ad placandum atque ad misericordiam reis concessa sint, deinde exorabilis populus, facilis suffragatio pro salute, denique etiam, si qua res illum diem aut auspiciis aut excusatione sustulit, tota causa iudiciumque sublatum sit."

¹ The trinum nundinum, which included three market days (Macrob. *Sat.* i. 16. 34), could not have contained less than seventeen days or more than twenty-four.

² Livy, xliii. 16. 11.

³ E.g. Greenidge, *Leg. Proced.* 306, 344. The theory has little in its favor and is not generally accepted; cf. Mommsen, *Röm. Strafr.* 167 f.

⁴ On the quarta accusatio, see Cic. *Dom.* 17. 45, quoted p. 259, n. 6. An example of the mitigation of a capital to a finable action is the case against T. Menenius for the mismanagement of a campaign which he had conducted as consul; Livy ii. 52. 3-5 (476). Two examples of change in the form of action in the opposite direction are given on p. 249 f.

⁵ Cic. *Dom.* 17. 45, quoted p. 259, n. 6.

⁶ Cf. the case of Appius Claudius Pulcher, p. 248.

Romaines, i. 203-7; *Études d'institutions Romaines*, 63-6; Liebenam, W., *Comitia* II, in Pauly-Wissowa, *Real-Encycl.* iv. 686-700; Humbert, G. (s. *Comitia*), in Daremberg et Saglio, *Dict.* i. 1378 f.; Voigt, M., *XII Tafeln*, i. 673-82; ii. 781-845; Karlowa, O., *Röm. Rechtsgeschichte*, i. 409; Girard, P. F., *Histoire de l'organisation judiciaire des Romains*, i. 104-59; Usener, H., *Italische Volksjustiz*, in *Rhein. Mus.* lvi (1901). 1 ff.; Müller, A., *Strafjustiz im röm. Heere*, in *N. Jahrb. f. kl. Altertum*, xvii (1906). 550-77; Vassis, Sp., *Leges valeriae de provocatione*, in *Athena*, xvii (1905). 160-5; Klüspert, O., *Ueber die Bedeutung und Gebrauch des Wortes 'Caput' im älteren Latein*; Dupond, A., *De la constitution et des magistratures Romaines sous la république*, 67-74; Moye, M., *Élections politiques sous la république Romaine*; Hallays, A., *Comices à Rome*, ch. ii; Morlot, E., *Comices électoraux*, ch. vi; Kappeyne van de Coppello, J., *Comitien*, 105-7; Borgeaud, C., *Histoire du plébiscite*, 45-57; Pantaleoni, D., *Della auctoritas patrum nell' antica Roma*; Greenidge, A. H. J., *Legal Procedure of Cicero's Time*, see index, s. *Centuriata Comitia*, *Lex*, *Provocatio*, etc.; *Roman Public Life*, 75, 252 f., 255; Abbott, F. F., *Roman Political Institutions*, 253-9; Wirz, H., *Perduellionsprocess des C. Rabirius*, in *Jahrb. f. Philol.* xxv (1879). 177-201; Mirabelli, G., *Di un processo politico avvenuto negli ultimi tempi della repubblica Romana*; Schulthess, O., *Der Process des C. Rabirius vom Jahre 63 v. Chr.*; Baron, in *Berl. Philol. Woch.* 1893. 658-60.

CHAPTER XII

THE COMITIA TRIBUTA AND THE RISE OF POPULAR SOVEREIGNTY

TO THE YEAR 449

IN the belief of the Romans the tribunes of the plebs, originally two, were instituted in 494 as a concession to the seceding commons to win them back to the state.¹ The historical truth of the first secession need not be discussed here; but there is no good ground for rejecting the view of the ancients either that the tribunate of the plebs owed its existence to a revolution or that it began at as early a date. According to our sources the plebeian tribunes, hence we may infer also the aediles, were for a time elected, and other business affecting the interests of the common people was transacted, in comitia curiata composed potentially of all the citizens.² The change in the form of organization in 471, from curiate to tribal, will be considered below. The president of the comitia which

¹ Livy ii. 33. 1; Calpurnius Piso, in *ibid.* § 3; 58. 1; Dion. Hal. vi. 89. 1; cf. Cic. *Rep.* ii. 33. 58; Mommsen, *Röm. Staatsr.* ii. 274 f. with notes. Meyer, in *Rhein. Mus.* xxxvii (1882). 616 f., suggests a doubt as to whether they were instituted at that time. Niese, *De annalibus Romanis observationes* (1886), and Meyer, in *Hermes*, xxx (1895), 1-24, have tried to prove that they were not instituted till 471 and that their original number was four. Niese's view is controverted by Joh. Schmidt, in *Hermes*, xxi (1886). 464-6. Pais, *Anc. Italy*, 260, 275, assumes that they came into existence as a result of the abolition of the decemvirate.

² Cic. *Frag. A.* vii. 48: "Tanta igitur in illis virtus fuit, ut anno XVI post reges exactos propter nimiam dominationem potentium secederent . . . duos tribunos crearent, . . . Itaque auspicio postero anno tr. pl. comitiis curiatis sunt"; Dion. Hal. vi. 89. 1; cf. ix. 41. 4 f. (included clients and patricians); Livy ii. 56, especially § 3, 10. These authors represent the tribunes as trying vainly to force the patricians from the assembly while the voting was under way. The question of excluding the patricians, however, is connected with the statute of Publilius Philo (339) rather than with the so-called plebiscite of Publilius Volero (471); p. 300 f.

Dion. Hal. vii. 59. 2, places the first tribal meeting in 491, twenty years before the date to which its institution is otherwise assigned. If his account is not an anticipation of later usage, it is exceptional.

elected the first plebeian tribunes was necessarily a patrician magistrate,¹ probably the pontifex maximus;² thereafter, with the exception of the comitia for the election of the first plebeian officials after the overthrow of the decemvirs, tribunes of the plebs presided not only for elections but also for judicial business and for the enactment of plebiscites (plebi scita).

The object of the office of tribune was the protection of individual citizens, plebeian and patrician alike,³ from oppression; and the means was the auxilium (official aid),⁴ which could be rendered in no other way than by personal contact; hence the law prohibiting a tribune from being absent over night from the city⁵ and requiring him to leave the door of his house open during the night.⁶ In the further interest of the citizens the tribunes had the unrestricted right to call the plebs to a contio and address them at any time and on any subject, to form them when so assembled into voting groups, at first curiae and after 471, tribes, and to take their votes on proposals affecting plebeian interests, plebiscites being from the beginning binding on the plebeian body in so far as they harmonized with the laws of the state.⁷

These were the two original functions from which the vast powers of the later tribunes gradually developed. As strictly

¹ (1) Because there were no other magistrates at the time, (2) because the meeting was auspicated; p. 262, n. 2.

² Inferred from the circumstance that this dignitary presided over the assembly which elected the first college of tribunes after the fall of the decemvirs; Livy iii. 54. 5, 9, 11; p. 285 below.

³ Livy iii. 13. 6; 56. 5; viii. 33. 7; ix. 26. 16; xxxviii. 52. 8; Suet. *Caes.* 23. Naturally the plebeians were in most need of protection; cf. Ihne, in *Rhein. Mus.* xxi (1866). 169.

⁴ Livy ii. 33. 3: "Auxilii non poenae ius datum illi potestati"; cf. Ihne, *ibid.* 170.

⁵ Gell. iii. 2. 11; xiii. 12. 9; Macrob. *Sat.* i. 3. 8; Dion. Hal. viii. 87. 6; Serv. in *Aen.* v. 738; cf. Mommsen, *Röm. Staatsr.* ii. 291, n. 2.

⁶ Plut. *Q. R.* 81.

⁷ In this respect the plebeian body was analogous to a corporation; Gaius, in *Dig.* xlvii. 22. 4 (quoting a law of the Twelve Tables). But it was not a private association. It could neither limit its membership nor change its organization. Proof of these two facts is that the change of organization from curiate to tribal and the consequent exclusion of the landless resulted from a centuriate law; p. 271. Notwithstanding the fact that its resolutions lacked the force of law, the close relation existing between it and the state gave it from the beginning a prominent place in the constitution.

plebeian officials they had no authority to summon patricians, to exclude them from the place of assembly,¹ or to condemn them judicially.² It follows that their alleged prosecutions of past consuls for maladministration³ are fictions⁴ — an anticipation of their jurisdiction at a later age. Directly they possessed no power of judgment or of coercion;⁵ but for the enforcement of the auxilium and of the *ius agendi cum plebe* their persons were made sacred — *sacro sancti* — by an oath which the plebs swore at the time they instituted the office,⁶ namely that any one who killed a tribune or aedile of the plebs or did him bodily harm, or who commanded another to inflict harm or death upon him might as a person devoted to Jupiter be killed with impunity, and his property be confiscated.⁷ The avenger was necessarily either a private plebeian or an official of the plebs.⁸ The formal act which rendered the tribunes sacred was termed a *lex sacrata*. The essence of such a law is (1) that it was sworn to by the community — in this instance by the community

¹ Livy ii. 56. 11–13 (The consul asserted that according to ancestral usage he himself had no right to remove any one from the place of assembly); cf. 35. 3: "*Plebis non patrum tribunos esse.*"

² Livy ii. 35. 3: "*Auxilii non poenae ius datum illi potestati*"; 56. 11–13.

³ Cf. Livy ii. 35. 2; 52. 3 ff.; 54. 3 ff.; 61.

⁴ Cf. Mommsen, *Röm. Staatsr.* ii. 320, n. 2; Ihne, in *Rhein. Mus.* xxi (1866). 175 ff.; Herzog, *Röm. Staatsverf.* i. 157.

⁵ Hence they had no *viatores*; so that for a time after they assumed criminal jurisdiction the aediles acted as their bailiffs; p. 290.

⁶ Livy iii. 55. 10: (In the opinion of some *iuris interpretes*) "*Tribunos vetere iure iurando plebis, cum primum eam potestatem creavit, sacrosanctos esse.*"

⁷ Fest. 318; Livy iii. 55. 6–10; Dion. Hal. vi. 89. 3. The wording of the oath as given above is derived from the law which, according to Livy, was carried by the consuls Valerius and Horatius in 449; but there can be no doubt that this statute confirmed the oath taken long before by the plebs. As to the connection of Ceres with the plebeian organization, Pais, *Anc. Italy*, 272 ff., believes that her temple was not built before the middle of the fifth century, whereas Wissowa, *Relig. u. Kult. d. Röm.* 45, holds to the traditional date (493); cf. De Sanctis, *Storia d. Romani*, ii. 30. The building of the temple did not necessarily precede the institution of the tribunate. On the *sacrosanctitas* of the aediles, see Cato, in Fest. 318. 8; Mommsen, *Röm. Staatsr.* ii. 472 f.

⁸ As late as 131 a tribune of the plebs, C. Atinius Labeo, regarding the censor Q. Caecilius Metellus as a *homo sacer* for alleged violation of the tribunician sanctity, attempted without legal trial to hurl him from the Tarpeian Rock; Livy, ep. lix; Pliny, *N. H.* vii. 44. 142 f., 146; Cic. *Dom.* 47. 123. See also Vell. ii. 24. 2; (Aurel. Vict.) *Vir. Ill.* 66. 8.

of plebs, (2) that the offender against it became a homo sacer and could be put to death with impunity.¹ This idea of sanctity the plebeians may have derived partly from the Greek asylum;² but it seems also to have been influenced by the condition of ambassadors, hence the later, ill-founded conception of the plebs as a state, and of the plebeian officials and other institutions as based on a treaty ratified with fetial ceremonies between the patrician government and the seceding plebs.³ Though termed *lex sacrata* because it was passed and sworn to in the community, as it were, of the plebs, like any plebiscite of this period the resolution had no legal validity for the state or for the patricians. Under compulsion, however, the government yielded to the demands of the plebeians without formally acknowledging the sanctity of their officials; so that the patricians, by asserting that Roman law did not recognize an inviolability founded purely on religion,⁴ could afterward deny that the tribunes were really sacrosanct. Till the enactment of the Valerian-Horatian laws of 449,⁵ accordingly, the inviolability of

¹ Cic. *Balb.* 14. 33; Fest. 318. 9; Herzog, *Röm. Staatsverf.* i. 147; also in *Jahrb. f. cl. Philol.* xxii (1876). 139–50; cf. Mommsen, *Röm. Staatsr.* ii. 286. Ihne, in *Rhein. Mus.* xxi (1866). 176, expresses the belief that the *lex sacrata* had nothing more than a religious influence, that the offender suffered in his conscience and in public opinion only. The known *leges sacratae*, collected by Herzog, were (1) the first Valerian law of appeal; Livy ii. 8. 2 (cf. ii. 1. 9); (2) the act which rendered the persons of the tribunes sacred, and which, as intimated above, was not strictly a statute; Livy ii. 33. 1, 3; Fest. 318. 30; Dion. Hal. vi. 89. 2; Cic. *Frag. A.* vii. 48; (3) the *lex de Aventino*; Livy iii. 31. 1; 32. 7; Dion. Hal. x. 32. 4; (4) the Valerian-Horatian law of appeal; Livy iii. 55. 4; (5) the military *lex sacrata* of 342; Livy vii. 41. 3; (6) the law of M. Antonius for the abolition of the dictatorship, 44; Appian, *B. C.* iii. 25. 94; Dio Cass. xlv. 51. 2.

² Pais, *Anc. Italy*, 263.

³ Dion. Hal. vi. 84, 89. 1; cf. vii. 40; xi. 55. 3; Fest. 318; Livy iv. 6. 7. The idea that there was such a treaty is represented among moderns by Schwegler, *Röm. Gesch.* ii. 249 f.; Lange, *Röm. Alt.* i. 591; ii. 566, and opposed by Herzog, *Röm. Staatsverf.* i. 146 f.; De Sanctis, *Storia d. Romani*, ii. 29.

⁴ Plut. *Ti. Gracch.* 15; Mommsen, *Röm. Staatsr.* ii. 287, n. 1. The fictitious character of the legal basis on which the plebeians are represented as acting in this early period of their history may be illustrated, as Mommsen, *Röm. Staatsr.* ii. 299, n. 3, has pointed out, by their assumption of the agrarian proposal of Sp. Cassius as one of their fundamental principles, the application of which neither magistrates nor private individuals were at liberty to impede; cf. Livy ii. 54, 61; Dion. Hal. ix. 37, 54; Schwegler, *Röm. Gesch.* ii. 480, 531, 567. The fault is not all with the annalists.

⁵ P. 274.